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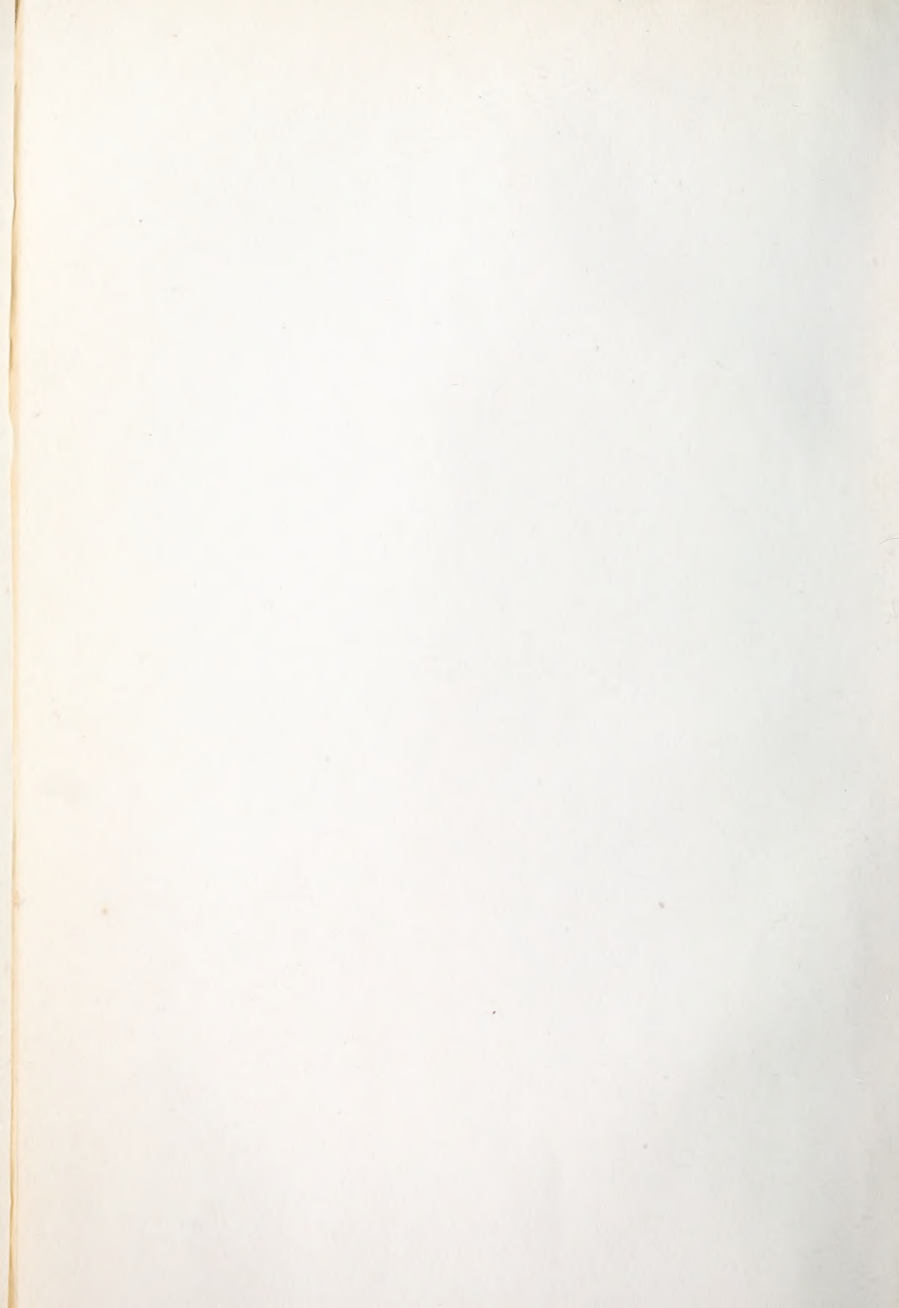
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A Contemporary Account of the Rebellion in Upper Canada, 1837

BY
THE LATE GEORGE COVENTRY, ESQ.

With Notes by the
Honourable WILLIAM RENWICK RIDDELL, LL.D., F.R.S.C., Etc.
Justice of the Supreme Court of Ontario



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A CONTEMPORARY ACCOUNT OF THE REBELLION IN UPPER CANADA, 1837.

BY THE LATE GEORGE COVENTRY, ESQ.

WITH NOTES BY THE
HONOURABLE WILLIAM RENWICK RIDDELL, LL.D., F.R.S.C., ETC.,
JUSTICE OF THE SUPREME COURT OF ONTARIO.

INTRODUCTION.

The following History of the Rebellion of 1837 is from a manuscript left by the late George Coventry of Cobourg who died in 1870.

The manuscript was procured for me through the kindness of Andrew J. Hewson, Esq., of Cobourg, who takes a deep interest in the early history of this Province.

The style is reasonably clear, though affected; it displays the pen of a ready writer, which, indeed, Coventry was.

I have added a number of notes to clear up and explain certain points, and I have been favoured with information by Mr. A. F. Hunter, Secretary of the Ontario Historical Society, which will be found at the proper places.

Coventry's vituperation is characteristic of the language almost universally used by the Loyalists of the "Rebels." A somewhat diligent student of the constitutional history of our own and other English-speaking communities I may be allowed to say that it is time such language should cease and Mackenzie recognized as an honest (if mistaken) lover of his country. No one, however, who knew Coventry will doubt his perfect sincerity.

William Renwick Ridell.

Osgoode Hall, September 29, 1912.

GEORGE COVENTRY.

George Coventry was born at Coppenham Fields, Hints, at Wandsworth Common, Surrey, July 28th, 1793, in the house "at the corner next the old road" and "within the sound of Bow Bells." His father was a ward of Bruce Dickinson, of Thetford, and was placed by his guardian with Jones, Havard & Jones, merchants, in London. His mother was Elizabeth Theoborrow, from Lupton Hall, Westmouthe, who was visiting Sir Joshua Reynolds, when she was won by Coventry. Coventry, Senior, afterwards was a member of the firm of Janson & Coventry, and seems to have been a man of considerable ability and literary tastes. The son had the misfortune in early life to lose his mother, who died of cancer when he was three years old. The lad was then placed in a Ladies' School, at Beckham, Surrey, kept by Mrs. Pothol and her three daughters, one of whom the elder Coventry afterwards married.

George Coventry was then sent to a Boys' Boarding School at Hitchin, Hertfordshire, kept by Mr. Blaxland, where he stayed for about three years. On the death of Mr. Blaxland, his undermaster, Mr. Payne, started a school near Epping Forest, which young Coventry attended until his fourteenth year, when he was sent to Dover, where he completed his education. He afterwards engaged as an employee in his father's firm, and in that capacity travelled over the greater part of Great Britain. He also visited France, where he thinks he saw at Fontainebleau some flowers, the offspring of certain plants which he had seen leaving Dover, a present from the Queen of England to the Empress Josephine. He came to Canada in the fourth decade of the 19th century, was an eye-witness of some of the occurrences of the rebellion of 1837, and returned to England in 1838. Returning to this Province he lived for a time in St. Catharines; afterwards he was in Cobourg, then in Picton as editor of a paper there, then he returned to Cobourg, and made that his home for the remainder of his life. He died at Toronto, February 11, 1870, and was buried in the St. James' Cemetery, Cobourg.

He left at his death a considerable mass of manuscripts, one being "A Concise History of the Late Rebellion in Upper Canada."

Coventry also left a considerable mass of poetry, more or less good; amongst the manuscripts is one seemingly based on Chaucer, which purports to be a fishing and hunting party at Rice Lake; it brings in a great many persons who were well-known in Cobourg, Port Hope, and the township of Hamilton, and each one of these is made to tell a story. At the present day the stories are rather rapid and of little interest to anyone except those who were acquainted with the persons to whom they are attributed. (I knew most of them by sight and all by name.)

He also left a manuscript, "Reminiscences," which contains an account of his life up to the end of the second decade of the last century. He gives an interesting story of John Wesley, and also the following:—

"I was at Vauxhall the night that George IV died. Everyone was in full black dress, which gave the Gardens a most remarkable appearance. Such a sight will never be seen again, for they are now abolished."

Coventry was employed by the Government of Canada to collect material for the History of Canada, and it was through his efforts that the "Simcoe Papers" were obtained.

According to my recollection, Coventry was a man of fine presence and dignified bearing and with the courtesy of an English gentleman.

Mr. A. F. Hunter has kindly furnished me with the following notes concerning Coventry.

From the Biography of the Hon. Wm. Hamilton Merritt, M.P., by J. P. Merritt, St. Catharines, 1875, I glean these items regarding the life of George Coventry:

P. 186. In 1838 Coventry assisted in the inspection of the Grand River with a view to the sale of the Welland Canal to the Government.

P. 191. In 1838 he was clerk for Mr. Merritt in the milling business at St. Catharines, and late in the same year he visited his friends in England.

P. 214. He was clerk on the Welland Canal in 1840.

P. 252. Coventry drew up the memoirs of W. H. Merritt's father, Thos. Merritt, who died in 1842, to be deposited in the Archives of Upper Canada.

P. 380. The Appendix to the Journal of the Assembly for 1851 has an 80-page history of the water communications of the country, nominally Merritt's, but probably Coventry's (at least partly).

P. 398. A pamphlet of 48 pages—"Historical Record of the Welland Canal" (1852)—also probably Coventry's compilation, in part at least.

P. 424. The Coventry documents in the Parliamentary Library at Ottawa contain 10,000 folio pages of manuscripts. It is interesting to note on the same page that W. H. Merritt, in 1858, interested himself in the historical material of Upper Canada, and in view of the work done by the Literary and Historical Society of Quebec in 1860 attended a meeting in Toronto to establish a Historical Society, probably the first serious attempt of the kind in Ontario.

P. 429. When at Port Hope in 1862, W. H. Merritt visited Coventry there, or in the vicinity, by this time.

MEMORANDUM

In the notes contractions will be employed as follows:

"Dent"—The Story of the Upper Canadian Rebellion by John Charles Dent, Toronto, 1885. This work is more than usually accurate in the account of the *Caroline* episode. I have not referred to "The Cutting Out of the *Caroline* and Other Reminiscences of 1837-38," by Robert Stuart Woods, Q.C. (afterwards Judge Woods), Chatham, Ont., 1885; everything of value in that work has been utilized by Dent.

"Head"—A Narrative by Sir Francis B. Head, Bart., 2nd Edn. London, 1839. I have not quoted Head's "Emigrant"; it does not afford any useful material.

"Leg. Ass."—Journal of the House of Assembly, Upper Canada, Session 1837-8, Toronto, 1838. (Official.)

"G. T. D."—The Burning of the *Caroline*, by G. T. D. (George Taylor Denison, Sr., father of the Police Magistrate of Toronto of the same name). *The Canadian Monthly and National Review*, Vol. 3, 289 (April, 1873). The head note reads: "The following narrative is by a Canadian officer who served against the rebels and their American sympathizers." It does not appear that Denison took part in the cutting out.

"Trial"—Gould's Stenographic Reporter, Vol. II, Washington, D.C., 1841. This contains a full stenographic account of the trial at Utica, N.Y., October, 1841, of Alexander McLeod, charged with the murder of Amos Durfee at Schlosser at the cutting out of the *Caroline*. It was satisfactorily proved that McLeod was not in the expedition at all, although both he and his friends had claimed that he was.

"Kingsford"—The History of Canada, by William Kingsford, LL.D., F.R.S.Can., Toronto and London, 1898, Vol. X.

"Lindsey"—The Life and Times of Wm. Lyon Mackenzie, by Charles Lindsey, two volumes, Toronto, 1862.

[Mr. Hunter is responsible for the notes marked H., Mr. Justice Riddell for the others.]

A CONCISE HISTORY OF THE LATE REBELLION IN UPPER CANADA, TO THE EVACUATION OF NAVY ISLAND.

"Unthread the rude eye of rebellion and welcome home again discarded faith."

King John, Act V, Scene IV.

By GEORGE COVENTRY.¹

The reader is here presented with an authentic narrative, written in a familiar style, by the author, to his sister in England. The current, vague reports of the day have been scrupulously avoided, as they would, if countenanced, embrace a far larger volume than the present, were he to commence the insertion of any ridiculous stories, which have, from time to time, been the theme of conversation since the commencement of the rebellion.

Chippawa, near Navy Island,
Upper Canada.

Chippawa, Upper Canada, 1838.

My dear sister:—

I little thought when we last parted² that it would fall to my lot to record an event which has lately happened in this rising colony. I refer to a cruel and unnatural rebellion which has broken out in Upper Canada.

An event of this nature might have been anticipated in Lower Canada, from the general proceedings of Papineau and his adherents, but that the seed of discontent should be sown in this happy province was an event totally unlooked for, and not even contemplated by any of the respectable settlers.

I see your curiosity is awakened to ascertain the cause, and to know by whom these iniquitous proceedings were perpetrated. In due time, with a little patience (which I know you to be gifted with) I will a tale unfold, almost as portentous as the one described by Shakespeare in his Hamlet.

You must know then that, as a young and rising colony, it is extremely difficult for any Government to be selected by the Mother Country³ who can please all parties, either by suavity of manners, conciliation, or the redress of grievances. In the nature of things he must give offence to some of the disaffected, particularly to those who are looking out for some of the loaves and fishes, when in reality, all the fragments are taken up. From the observations I have made, since my very pleasant residence in this country, I can find

¹ On the upper right hand corner of the front page of the MS. the following address is written in ink, apparently at the time the MS. was originally written, which may connect it with Coventry's visit to England in 1838: G. Coventry, Esq., Care of Messrs. Hunter & Coventry, Whitehart Court, Lombard Street. With the exception of Coventry's lavish use of capitals and his punctuations, which have been made to conform to current usage, the text is an exact transcript of the MS., in which spellings of proper names, often various in the original, have been made uniform. (H.)

² I have not been able to ascertain definitely the time at which Coventry left England.

³ Of course in those days the Governor did actually take a great part in "governing" the Province, and the personality of the Governor was of great importance.

but little that any moderate-minded man could, with propriety, complain of. This I have endeavoured to impress upon the minds of all those who, in social converse, I have at various times visited. Not that my own private opinion, as an individual, is of any weight or importance, yet every grain in the balance of argument tends to ameliorate and soften down the minds of those who look with a jaundiced eye on any supposed maladministration.

On maturely reviewing the cause of the late disturbances, it appears to me that had the people been compelled to pay more taxes toward the general improvement of the Province in the construction of bridges, roads, &c., there would have been less leisure time for fostering complaints. By complaints, you are not to understand that there were even these among men of sense and discernment. It was wholly confined to unlettered mechanics and farmers who, if no cause of distrust existed, would, in all human probability, have quarrelled among themselves.

A country so bountifully enriched by Heaven, with woods, forests, rivers, lakes and quarries only wanted the genial hand of industry to cultivate, so as to render the settler in a short time independent. This has been carried into effect to an immense extent throughout various districts, to the delight of the enquiring traveller, interested, as I have been, for one, in the growing prosperity of the human family. Nothing in fine was wanting but peace of mind to obtain for Canada the name of Utopia, so eloquently described by that great and learned man, Sir Thomas More. But no country under Heaven can become Utopian where the seeds of anarchy and confusion are sown by a few miserable strangers whose sole object appears to have been to reduce mankind to the same abject level as themselves. This I endeavoured to explain in a few letters which I wrote to Toronto two years ago. At that period there certainly was a restlessness and uneasiness springing up among many who, before the appearance of Mackenzie's writings, were good citizens and respectable members of the community. Alas, their minds became contaminated and poisoned.⁴ They exchanged their once happy firesides, their farms and their families, for the noisome pestilence of low taverns, where politics were freely discussed. But few of them understood the purport until explained by a rebellious faction to suit their own notion of things. Thus, events for which there was no real cause of disapprobation gradually spread into discontent: the fire was kindled by a few sparks, but gradually enlarged until it broke out into a flame which, for a short period, threatened to endanger the peace and happiness of the loyal part of the community.

⁴ That the agitation ultimately resulting in rebellion was factious, unfounded and due to malignity and ignorance was the honest opinion of the Governor and the governing classes: they did not believe, for they could not understand, that there were any real grievances; but there were others equally honest and equally intelligent who did understand.

The toad beneath the harrow knows
Precisely where each sharp point goes;
The butterfly upon the road
Preaches contentment to the toad.

We still have those who can see no merit in any of the claims of the Red Indians, and can think of Mackenzie only as a despicable little apothecary.

One great bone of contention was the question relative to the Clergy Reserves.⁵ To men of no religion this was a fruitful topic. It has often reminded me of the charge against our Saviour for using some precious ointment which the Pharisees contended ought to have been sold and given to the poor. Not that they cared an iota for the poor, but they wanted to find fault and raise contention, precisely similar to the demagogues here. You may remember that a very large portion of land in this country was voted by the Legislature for the use of the Clergy, in lieu of the odious system of tithes. This land was to be appropriated for the maintenance of the Clergy, and, in my opinion, a wise provision, provided it had been located in solid blocks of land, where it would not have interfered with the different settlers throughout the Province. But unluckily, where any great improvements were made throughout the Province, these neglected lands have been an eyesore to any further improvement in that district. They could not be sold; neither could they be exchanged or improved. On this account I consider the appropriation injudicious. You are not to infer that there has been no solitary instance of any improvement; but to take the observation on a broad scale by considering that these lands for the most part are lying idle in the midst of other improvements.

Session after session, various schemes have been submitted to bring this momentous question to some issue. But where the forms of religion are so divided and subdivided into various denominations, it has been totally impracticable to please all parties. Thus, year after year, time has rolled away, and instead of lessening the evil has invariably increased it, from the circumstance of men's minds having been unhinged by other topics. For the peace and harmony of society it would have been fortunate had the whole appropriation been swamped, similar to the land contiguous to the Grand River; but there the trees stand in all the stateliness of primeval nature, no sturdy peasants being allowed to let in the sun's rays preparatory to cultivation, when the earth would yield her increase in corn for the kindly use of the people.

I should weary your patience were I to enter into further discussion on the subject. Suffice it to say, that the last scheme agitated seems to me the most reasonable and most likely to give general satisfaction—the lands to be reinvested in the Crown, for the Legislature at home to appropriate for the best interest of the country, which will probably be done in the following manner:—

A certain proportion for general education, this necessary branch of economy at present being greatly neglected.

A certain proportion for dissenters of various denominations.

The remainder to the Church, either to be sold for a perpetual fund, or leased out to such settlers best calculated to improve the property.

⁵ The question of the Clergy Reserves is somewhat vaguely stated here, though with some fairness. The Constitutional Act of 1791, which brought the Province of Upper Canada into existence, provided for "the support of the Protestant clergy," and as each new township was surveyed, every seventh lot of land was set apart for the purpose. The Church of England claimed the lands thus sequestered, notwithstanding that a large majority of the population of the Province belonged to other Protestant denominations. After many years of political dispute on the subject, the Act, passed December 18, 1854, finally appropriated the Clergy Reserves for municipal purposes; Appendix (LL) to the Journals of the Legislative Assembly for 1854-5 contains the statistics of the funds. (H.)

There being a clause in the original grant, not generally known, giving the House of Assembly the discretionary power to amend the appropriation, nothing short of the above arrangement will satisfy the people, who, deriving no benefit from the lands as they remain at present, may be literally said to have sown the wind and reaped the whirlwind of contention.

I fear I have tired you with this dry subject, so pass we on to the chief engine of discontent—William Lyon Mackenzie. Demagogues like him, who leave their own country in disgrace and take refuge in another, where they have no character, to obtain for themselves an honest livelihood, either turn thieves, rogues or incendiaries.⁶ The latter is the course he has invariably pursued since his arrival in this Province: first, by inflaming the minds of the ignorant, and latterly, because he could not succeed in his rebellious views, putting the strict meaning of the word into effect, by setting fire to and burning Dr. Horne's house.⁷

This degraded being first turned libeller, thinking he could shake the foundation of social order in society, but as this scheme did not succeed where he could never gain admission, he made a few industrious mechanics, who have thriven by their industry, the scapegoats to further his degraded views. They unfortunately listened to his sophistry and ultimately became the deluded victims, while he ignominiously left them in the lurch by running away to the States, laughing in his sleeve at their credulity.

That the mind of man is capable of being egregiously imposed upon I readily admit. It has been so through all ages; but that an industrious people who have settled in the country, and thriven by its advantages, should have been led away by so notorious an adventurer, staggers every calm observer of men and manners. In the history of the buccaneers of South America, there are frequent traits of some noble manly feeling, but in the wandering of the arch-rebel Mackenzie, we neither hear of or discover one redeeming virtue for even the sympathizing to applaud.

I was of this opinion soon after my arrival in the country, on perusing his writings, and I entertain the same opinion now, after a calm survey of his atrocities.

The following documents alluded to in the former pages will shew you the low opinion that was even then entertained of his character and proceedings. Unluckily, however, for his poor deluded victims, they have cause to curse the hour they ever listened to the voice of a viper who has entangled

⁶This is a sample of the abuse then—and sometimes now—levelled at political reformers by those whose principle is *Quia non nocere*. It is grossly unjust to Mackenzie, whose personal character was above reproach both in Scotland, his birth-place, and in Canada; any crimes he committed were political. Most Canadians at the present time are of the same opinion as was he whose memory I hold in the utmost reverence; he who carried a musket against the Mackenzie rebels frequently told me that what Mackenzie sought was right, but his methods were wrong.

⁷Dr. Robert Charles Horne, a somewhat prominent physician; he was at one time King's Printer and published the *Upper Canada Gazette* at York (Toronto); he got into trouble by publishing matter offensive to the Government really written by his reporter, the well-known Francis Collins. Retiring from this position, he became Assistant Cashier in the Bank of Upper Canada. He was an active member of the Medical Board of Upper Canada who examined and licensed students of medicine, authorizing them to practise. He detested and despised Mackenzie, and Mackenzie during the short campaign of 1837 burnt his house on the east side of Yonge Street, nearly opposite the Davenport Road. This act of Mackenzie's seems to have been wholly without excuse; and he never satisfactorily explained it.

them in the net of destruction by his venomous writings.* Immersed in jail, away from their once happy homes, deprived of the comforts of their domestic firesides, their wives, children and social acquaintance, the ultimate confiscation of their farms and property, these deluded victims through the instrumentality of a miserable renegade, forfeit their future peace of mind and happiness, perhaps their very existence, for a visionary project which could never benefit them one farthing, it being impossible, from the known loyalty of nine-tenths of the inhabitants here, for it ever to be brought to maturity. But I digress from the subject I alluded to, which I now forward for your perusal:—

‘An individual, signing his name W. L. Mackenzie, has put forth a rhodomontade in the *Advocate* newspaper, which he addresses to the people of Upper Canada. He quotes a motto from the satirist, Churchill, which he thinks applicable to his subject, but, alas, in his blind zeal for the fulfilment of his wishes, the downfall of all institutions in which he has no share, unfortunately for him, applies to himself, viz., “to spread destruction o’er the land.” Native does not include him for he is an exotic that can bloom in no country.

The genial land of his forefathers, which fostered men of principle, and gave birth to promoters of institutions for the benefit of the country at large, is too fair a soil for his reception. He therefore seeks an asylum in this land of freedom, and addresses his philippics to an intelligent race of men whom he calls fellow countrymen. He may rest assured they are no countrymen of his, for they will not own him. He is too spurious a breed to be engrafted on so honest a stock. Instead of improving the fruit, the tree would wither, as by a pestilential blast. He is comparable to a blight wafted by an eastern breeze that destroys whatever it touches. Yet this outcast from his native land has the audacity to frame rules of advice for this people’s government and sets himself up as an oracle of the first order to be consulted. He may rest assured, however, that none but fools and madmen listen to his nonsense. Men of sense scorn his principles, laugh at his follies, and spurn his advice if a jumble of declamation may be classed under so comprehensive a word. His style is coarse, his bombast low and vulgar, indicative of the society he must formerly have kept: his reasoning, fallacious; his effrontery, unparalleled. Yet this rude inhabitant of Scotia’s hills has the vanity to think that his farrago is clear as law and comprehensive as the Gospel.

Like Dionysius formerly, he is surrounded by his satellites, who applaud his compositions and submit to his dogmas, but they will find to their sorrow that when his leaf is in the sear, they will wither as quickly and fall equally unregarded.*

His own operations being a bubble, he concludes all institutions like them. Needy in pocket, he envies his more fortunate possessors of a circulating medium called money, and would wish to level all the industrious and thriving

* It would be difficult to conceive of a more delightful collection of “Hibernicisms.” A *riper* deludes his victims by his *voice*, and thereby *catapults* them in a net by his *venomous writings*, and Coventry was an Englishman! The *Advocate* mentioned just below is, of course, *The Colonial Advocate*, founded by Mackenzie, published at Dundas, the first issue being May 18, 1824; he removed it to York in the following November, when he changed his residence to that city, and continued its publication till the time of the Rebellion.

Since fully realized.

to his own scale of penury. He compares a paper currency to a gylst mill and the issuers to fashionable rogues, forgetting that when he has discounted himself, the old adage applies that the receiver is as bad as the thief.

Like a weathercock, he is blown about from north to south, from east to west, all institutions now eyeing his name with a suspicious eye. A quietus, however, from any of the banks would long ago have been sufficient to lure his restless spirit to repose, and cause him to adore any establishment which would enrich his finances. A needy adventurer in a young colony can never be encouraged, unless he is found to possess the intrinsic virtues of an honest, honourable man, which he can never aspire to. Hence his epithet "scourge of the colony" which he may bear in mind applies with more force to him elf than to the Bank which falls under his censure and reproach.

Like Lucifer, he introduces religion when any particular end is to be accomplished, and talks to the mechanic and farmer with as much effrontery as tho' they were as devoid of talent and foresight as himself. He dives into the private affairs of intelligent men with as little caution as he exposes his own ignorance. One minute, his watchword is—"Away with paper currency"; the next, he proposes the establishment of a Bank on a foundation as firm as a rock. He tells us that the old Bank, as well as the new ones, keep the merchants in chains and the farmers in fetters; but that the bank which he proposes to sanction will break their yoke. What delightful news! This shallow brained individual forgets to tell you that he has found out the philosopher's stone whereby you can live without any trouble. According to his statement, the Upper Canada Bank is in a bad way as well as all others; therefore, what a fine opening for the firm of Mackenzie & Co. Farmers, prepare for a storm, for it is approaching, and when you see the sky above this silly financier look black, which it frequently does, and the Bank once announced as about to be opened, look to your wheat, for it will then want housing.'

Again

'The wolf that has for several weeks quietly slept in his lair is again on his rambles. With a hungry appetite and glaring eyes he is not dainty about his prey. A limb of a parson, a lawyer, a judge or a civilian,* all serve him in turn to pick, and this he does with very little mercy. Like the eastern serpent, he tries to charm his prey before he seizes it, and commences his attack by treating his readers with a quotation from the powerful pen of the prophet Micah. Instead of referring to Dean Swift he should have perused the whole chapter from the original, as well as the previous one, wherein he would have found the following applicable to himself:—

"Woe to them that devise iniquity and work evil upon their beds: when the morning is light they practise it because it is in the power of their hand."

He also quotes an extract from a country paper, applauding a country preacher for diverting the minds of his congregation from their religious duties, and for turning the house of prayer into a Compting House, or rather into a den of thieves to hear him preach sedition. This he imagines will

* Probably the parson was the Hon. and Rev. Dr. John Strachan, afterwards Bishop of Toronto; the lawyer, Henry John Boulton, Attorney General, or Christopher Alexander Hagerman, Solicitor General, both afterwards raised to the Bench—the Judge, Sir John Beverley Robinson, Chief Justice of Upper Canada—the name of the civilian was Legion.

tickle the reader's fancy. All this is a circuitous route to reach this sign post, with the name of McNab¹⁰ written upon it, and to level his abuse at that gentleman as well as all lawyers. If he had been named one of the commissioners, all would have gone on right for a time, and Chief Justice Robinson would then have been a man of discernment, but that honest judge knew the *Lyon* too well to allow him to lie down in the same lair. So he growls and thinks the law very wickedly concocted.

The truth is;—he envies all thriving men and upholds them to the world as a parcel of rogues and rascals as devoid of principle as himself. His sole object is to stir up confusion in the land, as his writings too plainly testify. But never let him show his face again in the Gore District after the horse-whipping he so justly received.

Whither then can this restless, unhappy, degraded mortal retire? If he wend his way to Hamilton, the finger of scorn is pointed at him. In the west, his name is a byword of detestation and reproach, and at home he is too contemptible for notice any further than as a miserable object of compassion for his follies. He has placed himself on a level with a common incendiary† who eyes with jealousy the fruits of industry that he cannot partake of, and sends forth a firebrand to reduce his neighbours to that abject condition he is himself condemned to.

Reckless of his own character, his bosom harbours all the furies of Cerberus, which he lets loose upon the public to suit a bewildered and chagrined imagination. He possesses none of the graceful qualities of man, as justice, verity, bounty, mercy, lowliness, courage or fortitude, but like Malcolm in Macbeth

“ abounds
In the division of each several crime
Acting it many ways. Nay, had I power I should
Pour the sweet milk of concord into Hell,
Uproar the universal peace, confound
All unity on earth.”

This scion of so loathsome a stock fancies his low scurrilities acceptable to the people. A very sorry opinion they must have of any stranger who derides all institutions and belies his Governor by asserting that the meaner the individuals are who approach him, the better he likes them, who libels all government officers by asserting that they are “tipsy fools.” None but cowards and villains dare make use of such gross epithets, since they shelter themselves under the mask of the lowest rank of rebels, who aim at the destruction of society altogether. Such bravadoes never fight, because they have no innate feeling of honour, and they are too contemptible for prosecution as every respectable individual pities a wretch so debased in the scale of human nature.

Blind to his own degraded station, he talks of brazen faces and a black-guard press, forgetting that no one bears so close a resemblance to the former and no press possesses the title of the latter but the one polluted by his

¹⁰ Of course, Hon. (afterward Sir) Allan Napier MacNab.

* Since absconded to the States, where he has been fostered and protected by a race of men as devoid of principle as himself. Men of integrity would not countenance his proceedings, nor have they.

† Now proved by his actions in December last.

own letters. Hence, the tyranny he speaks of engendered by his own venom, and this he calls a responsibility that he never shrinks from. Many of no principle claim this as a privilege, having no responsibility to offer, yet this tyrant of the press stigmatizes the whole Gore District as the meanest set in the colony. They are not so mean, however, but they can appreciate his good opinion of them in a proper way by the application of a horsewhip at a cart's tail on his next appearance there. A man must be gifted with a consummate impudence to utter so foul a slander, but he knows no better, not having been brought up in the school of propriety. Wrapped up in his own mercenary views, he is too callous to see his own distorted image in the mirror of life. Yet this empty-headed individual has been heard to say that "Every man has his price" as a bait for the Government. But, thank God, it is composed of men of too clear a discernment to harbour a serpent who, when warmed by the fire, would instantly turn round and bite them with his venomous teeth.

How fully many of the above insinuations have come to pass, you will perceive as we enter further into our narrative. Suffice it here to draw your attention to two facts:—the first, wherein his conduct since, has fully justified the severe censure passed upon him at that period, and his recent cowardly conduct in running away to the States, leaving his *infatuated* friends, as he termed them, to fight their battles in their own way. Numbers of these having property at stake in the country, (which he has not), returned to their disconsolate homes and have since been incarcerated in jail to await trial, in consequence of information by their own party. So true it is, as Shakespeare justly observes, that rebellion seldom prospers,¹³ first, by reason of its being a bad cause, and secondly, by disunion among the leaders and perpetrators. The subjoined letter to Mackenzie himself terminates the interest I have hitherto taken in his proceedings. I considered that by endeavouring to stem the torrent of his incendiary writings was no more than a duty which everyone owes to a liberal government interested in the happiness and well being of the colonists. The hour has arrived when it is gratifying to reflect that

"His treasons now sit blushing in his face,
Not able to endure the light of day,
But, self-affrighted, tremble at his sin."

—*Richard II.* Act iii, Scene ii.

¹³ "There's such a divinity doth hedge a king

That treason can but peep to what it would,"—*Hamlet*, Act 4, Sc. 4.

"Thus ever did rebellion find rebuke,"—*1 Henry IV.*, Act V, Sc. 1.

"Rebellion in this land shall lose his sway,"—*1 Henry IV.*, Act V, Sc. 1.

There are several like passages in *Richard II* and *2 Henry IV*. Possibly Coventry was thinking of Sir John Harrington, who gives the true reason of treason's want of prosperity:

"Treason doth never prosper: what's the reason?
For if it prosper, none dare call it treason."

—*Epigram*, "Of Treason."

Toronto, October, 1835.

To William Lyon Mackenzie.

"I make no apology for commenting on your extraordinary outrage upon society. Your palpable falsehoods betoken a heart devoid of all principle. Not content with attacking the institutions of the country, you descend to private individuals with a scurrility that none but the lowest dregs of society would ever countenance. This you style Patriotism, and set yourself up as the high priest of reformation, a word that I very much doubt you know the meaning of. I would seriously recommend you to set about reforming yourself. For this one act, the world might perhaps give you credit, provided you shew any sincerity, but, alas, it is contrary to your very nature. No credit can ever be due to a driveller who sits down to sap the foundation of order and good government, and who endeavours to stir up confusion among an honest, peaceable and industrious yeomanry. If you anticipate any result by your inflammatory and incendiary writings, you will be disappointed. The aggregate of the community are not such fools as you take them to be: they are men of sober, calm reflection and reject your dogmas and advice with scorn. You may ape the politician and man of intellect in a low tavern, a place you seem particularly partial to, to circulate your opinions; but even there, your follies are discussed after your departure; whichever way you turn, your hopes are frustrated. All the low cunning you possess will never turn to account, because you have no principle in your plans. They are visionary, chimerical and foolish, fit only for Robespierre or Danton, not for a respectable community.

Your vanity leads you to suppose you are lord of the ascendant, and that the name of Mackenzie is a tower of strength. Poor, frail man, you are not the first to swim on empty bladders. Conceit has been the stumbling block of thousands besides yourself, therefore you by no means sit solitary in the annals of tomfoolery. Your chief juggler in politics behind the curtain makes you the scapegoat and is no doubt delighted that you are a willing instrument to bear the brunt of popular derision. Recollect that this is not the reign of folly as once was the case in France. The people now think and act calmly for themselves and are not so easily led away by demagogues and low raillery.

Your time has been profitably employed in feeding yourself during the summer months at the expense of the public in looking over the Welland Canal books, an arduous undertaking truly to a man like you, so little skilled in accounts, but which an accomptant of the commonest capacity would have accomplished in one-fourth the time. But this did not suit your finances. You must be kept, and pretty well too. Yet you turn round when your laboured task is completed and bite the very hand who has fed you. To render your name the more infamous, you betray the trust confided in you, and slyly convey items of *private* expenditure to a distant paper, thinking it would not be supposed that you were the aggressor. This is the quintessence of baseness, but quite consistent with the depravity of your mind.

The page of history can scarcely furnish an instance of such barefaced treachery, with the exception of Caesar Borgia, of whose dark and lowering soul you are the very type. This is indeed a pitiful extremity for any man to arrive at, especially one who has the audacity to call himself a patriot, and one who has secretly been trying to stir up rebellion, whereas your private

character ought rather to be faultless like Sydney's to give confidence to your adherents. Not so with you. On the contrary, you appear to possess all the various and black passions of Caracalla's soul. You write with the anguish of a tortured mind and a disordered imagination. Were you conscious of one spark of humanity, you would shudder at the palpable falsehoods you circulate to the world. But this spark, if ever you possessed it, appears for ever extinguished, leaving you the possessor of a tenement that no one can envy you possession of. But the hour of reckoning must arrive, when all the horrors of a guilty conscience will arise in judgment against you. This alone will be a sufficient punishment for the barefaced assertions you have promulgated. Remember that, although you may flee from the punishment you so justly merit, yet you cannot avert the retributive power that inevitably pursues the liar, the treacherous and the ignoble. You will then retrace your ambitious footsteps to the path of obscurity from whence you emanated, a fatal lesson to forlorn adventurers like yourself."

How far this prophetic declaration is verified, you will be made acquainted with hereafter. One assertion I may boldly make, that the latter part is not far from the truth, when we know to a certainty that he at present is a fugitive and a vagabond on the opposite shore. The people in that quarter will soon find to their cost that they have cherished and countenanced the proceedings of an individual in every respect unworthy the confidence of even a nation of savages.

From the general tenor of his writings, it required but little discernment to see through his ostensible object. Not content with undermining the foundation of the government, by denouncing all proceedings connected therewith, he launched out into invectives against every public establishment throughout the country. Banks, canals, in fine, every institution of public utility was censured and abused.

That he was a hireling connected with some rebels in the mother country and the States, I have always thought, and now firmly believe from correspondence that has been found in the fugitive's papers. Their main object appears to have been to create distrust in the government and weaken the power of the country in every possible way.

In the English House of Parliament, the outcry against profuse expenditure was made the subterfuge for removing the Naval Establishment here. Having succeeded in that, the object of their wishes, they then proceeded to further extremities. I was extremely sorry to find, when I had the pleasure of seeing Commodore, now Admiral, Barrie, at Montreal, that he was called home, and that the Establishment was to be abandoned. This was the most unwise, injudicious proceeding that was ever carried into effect by the colonial policy. It was conducted at a small expense and at all times a valuable check against any insubordination. The present results have proved the truth of this assertion.

In a country abounding with such fine navigable lakes and rivers, there was fine scope for their movements from one end of the colony to the other.¹²

¹² The abandonment of the Canadian Naval Establishment in 1842 by the British Admiralty was the result of several causes, viz., the successful operation of the Rush-Bagot Agreement of 1817 by which Great Britain and the United States were each to maintain no more than one gunboat each on Lake Champlain and Lake Ontario and no more than two on the upper lakes, the introduction of steamboats and the development of steam navigation by the St. Lawrence, Ottawa and Rideau routes

Gunboats have been tested in all countries as most formidable engines of war. In this province most essentially so, either for the conveyance of troops suddenly from one district to another, from Lake Ontario to Lake Erie or elsewhere, or for the destruction of piratical vessels. They require no harbour in their evolutions, as they can run into any creek, or anchor close along the shore in case of emergency. An Establishment managed by sailors of intrepid courage, as they have unanimously been proved to be, should be fostered and protected even in the days of profound peace, particularly so when located in the vicinity of a country liable at all times to encroach upon our borders. Not that I would have you to imagine the restless temperaments of its inhabitants would do so with impunity. But the question relative to the boundary line, not having been amicably settled, always afforded a pretext for some national squabble, and until that important question was finally adjusted, there was the greater need for an Establishment of observation. The propriety of this remark is now generally admitted, and with just cause, since the late outrageous proceedings by American citizens, with whom we have for many years been on terms of good fellowship and communion. On perusing the details of the late conflict, you will be made fully acquainted with the services which some of those disbanded gallant fellows rendered in the cause of their country and which justly entitled them to the thanks of their government. The framers and plotters of the rebellion were well aware of their utility, and on this account laid their plans and succeeded in having them removed from service. All this was done under the mask of befriending the people by a reduction of the expenditure of the nation. You are aware that I am averse to every species of warfare but, until the nations become more nearly allied on true Christian principles, war and all its concomitants appear as necessary evils which society has to endure to cement it together.

Not only was the country deprived of assistance from this valuable Naval Establishment, but the army was reduced to a part of three regiments which had been removed to Lower Canada on the breaking out of the rebellion there. Steamboats, schooners, scows, boats and every description of craft were laid up for the winter, icebound, none of which were contiguous to Chippawa, where they were afterwards most wanted. Under these circumstances never was a more favourable opportunity for Mackenzie's party to create confusion, although the plans were visionary in the extreme. They were considered so by the Governor* himself, who knew all their movements and who even allowed them a full opportunity of making the experiment. So contemptible did he consider the party that he even took no measures to prevent their private drilling, and allowed the leader to circulate his seditious writings.¹³ Free scope for action was afforded, thinking that the deluded people who

in 1826, etc., the approaching completion of the Carillon, Grenville and Rideau Canals, begun in 1827, and the opening of the Welland Canal in 1829. These changes had a profound effect upon the naval situation in Canada, yet Coventry seems to ignore all of them in forming his judgment of the abandonment. See T. C. Keefer's "Canals of Canada" (1894); also Dr. Scadding's "Toronto of Old," p. 505, for the public sale of naval supplies at Penetanguishene, March 15, 1832, at the abandonment of the Establishment. (H.)

* Sir Francis Bond Head.

¹³ Sir Francis Bond Head had utterly disregarded the numerous warnings that private drilling was in progress, if not disbelieved them. See for example, "A Veteran of 1812" (FitzGibbon), pp. 188-191. (H.)

acted in unison with him would be tired with his cajoleries. Whether this was a politic measure is not for me to determine, but it shows the forbearance of the Governor's policy, he being unwilling to do one single act that could be construed into harsh measures. He was determined to show by his lenity that there should be no ostensible cause of discontent.

I know that very many have censured this lenity as objectionable and have stated that steps should have been taken, either by proclamation or otherwise, to warn the people who were known to be drilling privately that such proceedings were unconstitutional and could not be sanctioned; that if persisted in, they would be put down by the authority of the law. Then, again, further agitation might arise and secret meetings might be extended, from which but little could be elicited. Mackenzie might also have been arrested and tried for overt acts of treason. But should any of his adherents be jurymen and he be acquitted, as he had been before, the affair would not be lessened by a trial. Under all these circumstances, therefore, the Governor's policy has worked for the best, as it now convinces the country how very few disaffected there have, in reality, been found to support so feeble a cause. All that Sir Francis considered necessary, knowing their movements as he did, was to swear in a number of special constables, in the event of any disturbance happening in the city, which he did not from the nature of things anticipate; and to order warrants to be prepared for Mackenzie's apprehension, which were out against him a short time preparatory to their movements taking place; and it is not a little extraordinary that he was not arrested, because on the 2nd of December, only two days previous to the assembling of the forces, he was seen in Toronto eyeing the public buildings in an unusual manner, which could only be particularly noticed by those in the secret.

From recent disclosures, it appears that his adherents were more numerous than they had been supposed to be. In bye districts, they were, as I observed to you before, principally confined to unlettered mechanics and farmers of no standing in society; consequently, although the Governor was informed of these committees in September, yet he did not think them of sufficient consequence to employ spies in order to watch their proceedings. It now turns out that there was a department in the City of Toronto, termed the executive, who regularly met for treasonable purposes and who carried on their proceedings with as much secrecy as the corresponding society in England. Some of these were men of reputed talent, and at one time respectable members of the community, but unhappily for them, their minds became tintured with visionary projects, so deeply rooted as to carry them beyond the power of retracing the path of domestic quietude. They swore fealty to their unhallowed cause, and were thus hurried headlong into a vortex from which they never became extricated. I explained to you the nature of the Clergy Reserves which they bitterly complained of. Another grievance was the following:

You are doubtless aware that the form of government in this Province is a type of our own in England,¹⁴—a privilege that many colonies do not

¹⁴ It was such in form, but the Lieutenant-Governor believed it his duty to govern in fact: he thought government through a ministry responsible to the people was Republicanism. Responsible Government had been fairly well established in England, but it had not yet reached this Province. (See Note 15, *infra*.)

enjoy. The Governor is the chief magistrate, as representative of the King. The House of Assembly consists of delegates from various departments of the country, chosen by the people for the general transaction of public business. The Legislative Council is a House of Lords on a small scale, with the plain addition of Honourable to their names. They are appointed by the Crown and hold their tenure for life. It is as difficult to remove one of them as a nobleman in England. Therefore the greatest discrimination was necessary, in the first instance, to ascertain whether they were men of the strictest integrity and honour. Their power is very great, no laws or bills being carried into effect without their sanction. They are a check upon the House of Assembly precisely similar to the Lords at home. No form of government is better suited to a community if carried on and conducted by men of sound principles and discretion. Yet this was a source of contention with the radical party, not being framed to suit their revolutionary views. Roebuck, Hume, Mackenzie and others have misrepresented those gentlemen because they acted upon principle in accordance with their oaths. They endeavoured to alter the system by having the members elected by the people, to hold their tenure at the people's will and pleasure, but such an alteration would never answer. It would unhinge the whole government arrangements and create constant schism and contentions in the country.¹⁵ Certain demagogues would be delighted with this, it being their ostensible object. Such political vagaries are happily now silenced; order is again restored, and both Houses feel a pride in co-operating together for the general weal of the Province by promptly sanctioning such measures most likely to promote the best interests of the people. But to proceed with our narrative.

What became of his executive and those in various districts who acted in unison with them I shall explain as we proceed, so will not detain you longer from a recital of facts, which I doubt not will interest you, although the subject is a rebellious one.

It was the evening of Monday, the 4th December last, that the public were first made acquainted with the fact that the plans of the rebels were brought to maturity. I was then in the vicinity of Chippawa, contiguous to the Falls, on a visit to my friends Captains John and Edgworth Ussher,¹⁶

¹⁵ The main grievance is not included by Coventry in this category, and it is nowhere else stated by him. Sir F. B. Head insisted on his right to seek for persons suitable for the Executive Councils, and to ignore what the House of Assembly said about the fitness of men for executive responsibilities, and the Assembly's right to nominate them. The Demand for Responsible Government as to men as well as measures, which his six executive councillors thus made he repudiated and "politely bowed them out of (his) service" (Head, p. 66). This precipitated the stopping of the supplies, and raised the chief grievance about which the so-called Rebels complained. The subsequent general elections in Upper Canada, which commenced on June 20, 1836, and lasted for some weeks, changed the complexion of the House of Assembly in favour of the Governor, but this was chiefly accomplished by corrupt practices in which the Governor himself took a hand. The result only aggravated the situation, and increased the rancour of the defeated party, the more pessimistic of whom, losing patience, plotted the drastic measures that followed. (H.)

¹⁶ Captain Edgworth Ussher was afterward assassinated at his home on the Niagara frontier by a citizen of the United States named Lotte, November, 1838. Their sister was the wife of George Mitchell, physician, at Penetanguishene, Ont. See A. C. Osborne's "Old Penetanguishene; Sketches of its Pioneer, Naval and Military Days," p. 55. (H.)

whose houses stand opposite to Navy Island, the scene of so much commotion afterwards. I was sometimes at one house, sometimes at the other, their estates lying contiguous. There we shortly became acquainted with the insurrection that had broken out in the vicinity of Toronto about 100 miles distant. In the general excitement of the moment, and the contradictory accounts that were brought us, it was difficult to get at the real truth of the affair, more especially as many in Chippawa and its vicinity were favourable to the rebels' cause, who circulated untruths and exaggerated statements to suit their own views. I never contemplated it possible that any attempt would be made to change the form of government, although I well knew that many idle and ill-designing people nightly congregated to discuss the question. Indeed, the hotel where I had been residing during the summer season became at last annoying to me every time I entered it, from the circumstance of so many discontented and disaffected individuals assembling there. They nevertheless always treated me very well, although it was evident that my principles, which I boldly divulged in favour of the existing Government, were often a source of disquietude to them. On my return of an evening to retire to rest, it became a sort of countersign among them, "Here comes the Tory." This I laughed off, not dreaming that matters were so nearly ripe for an insurrection. Latterly, I seldom troubled them with my presence, as I could plainly perceive they were too strongly tinged with Mackenzie's principles for me to eradicate, or make any impression on. Whether they looked upon me, as I often thought, as a spy to their proceedings, or from whatever cause, it was evident some of the most abandoned would gladly have put an end to me, as I was privately warned to be careful in my wanderings to and from the *Usshers'*, a solitary walk along the banks of the Niagara River for two miles. I was marked, and many supposed I certainly should be shot. This I but little heeded, being conscious that I had never done anything to injure a single individual in the neighbourhood. As a matter of prudence, however, my kind friends prevailed upon me to pay them a visit previous to my going to St. Catharines, where I had made arrangements to spend the winter. All these circumstances, combined, show how difficult it was, on the news arriving of the Toronto affair, to place any reliance in true matters of fact. Nor was it until I met with Captain Brooks afterward at Colonel Arnold's, that I knew to a certainty the real circumstances of the case.

I recollect one circumstance that happened a short time previous to the insurrection, which convinced me that very many were in the secret as to what was going forward and the time fixed upon for a general rising, which has since been corroborated by Mackenzie himself. This was the appearance of Dr. Chapin¹⁷ from Buffalo, whom I casually met at my hotel where I was then staying. This was the commencement of December. It was late in the afternoon, after the usual dinner hour, so one was prepared for him. I had been out shooting and was also behind time. Mr. Coles accompanied me. We soon entered into conversation on sundry topics, one of which was relative to Mackenzie, whom the Doctor said he knew. At that time both Mr.

¹⁷ Doctor Chapin of Buffalo. See Lindsey, Vol. II, p. 124. (H.) Also "Makers of Canada" Series, G. G. S. Lindsey's Edition, p. 411. Mackenzie calls him "the venerable Colonel Chapin."

Coles and myself were ignorant with whom we were conversing. On enquiry afterwards we found he was one of Mackenzie's staunch adherents and without a doubt in the secret relative to his movements and the time fixed on for revolt, from the circumstance of Mackenzie proceeding directly to his house on his sudden flight to Buffalo. In the course of conversation, we spoke our minds very freely as to his general character and politics, and I distinctly recollect both of us stating that we believed him to be one of the greatest traitors and rascals that ever went unhung. He replied: "That may be your opinion, gentlemen, but many others differ from you." We nevertheless parted on very good terms, the Doctor giving us an invitation to call upon him, should business or pleasure lead us to Buffalo. The following morning he proceeded to the Short Hills,¹⁸ a district known to be full of rebels. Where he went to from thence I never learnt or took the pains to enquire, but I conscientiously believe, as well as many others, that his ostensible object in coming over was to reconnoitre how the affair would terminate after the 7th of the month, the day agreed upon by the executive for the assembling of the rebel forces. For the organization of their plans I give them no credit. Never was a measure so weakly managed or carried into effect. It, however, tended to show, notwithstanding the belief to the contrary, how very few throughout the country could be found either ready or willing to carry things to extremities. One circumstance alone, throughout the whole train of events, certainly was well kept, namely the secret relative to the day appointed for a general muster, which Mackenzie himself stated was known three weeks beforehand. Out of the various characters implicated, many of whom were of the most abandoned and profligate, I never heard of but one who revealed the secret or was rash enough to betray them. This may be accounted for from the circumstance that had the delinquent been discovered he would inevitably have forfeited his life by assassination. But to proceed.

The rebel force assembled at Montgomery's Hotel,¹⁹ about four miles distant from Toronto. Their plans, according to the declaration of their leader afterwards, were to proceed to the city, join the executive there, seize 4,000 stand of arms which had been placed in the City Hall, take the Governor into custody and hang him on his own flagstaff, place the garrison in the hands of the liberals, declare the Province free and call a convention together to frame a new constitution.

Unaccountable as this bold measure appears, numbers who joined the stan-

¹⁸ The Short Hills. See Brig.-Gen. Cruikshank's "Insurrection in the Short Hills in 1838." (Ontario Historical Society's "Papers and Records," Vol. VIII, p. 5). (H.)

¹⁹ "Montgomery's Tavern was a large wayside inn with a broad platform in front and with a lamp suspended over a central doorway. It stood within a few feet of the site now (1885) occupied by the brick hotel at Eglinton. It was owned by John Montgomery, a prominent Radical of those days." Dent, Vol. II, p. 43. The tavern was a well-known meeting-place of the discontented. Montgomery took part in the Rebellion, was tried for treason and convicted before Chief Justice Robinson: sentenced to death, his sentence was commuted to transportation for life: he with some others escaped from Fort Henry, Kingston, and went to the United States; he kept hotel at Rochester for some time. Pardoned in 1843, he returned to Canada and rebuilt his Tavern, which had been burned in December 1837; subsequently removing to Barrie, he lived there till his death, October 31, 1879, in his ninety-sixth year. For some further particulars of his early life (and portrait), see "Guide to the J. Ross Robertson Historical Collection in the Public Reference Library, Toronto," 891.

dard believed it was practicable, and actually left their homes with rifles, fuses and old muskets to put the plan into execution. Toronto, as I before observed, was at that time in a defenceless condition, no preparation having been made for any meditated attack further than the swearing in of a few special constables, such implicit reliance had the Governor in the general loyalty of the country. The whole of the troops had marched to the relief of Lower Canada, their assistance being required there in consequence of the known disaffection of the Papineau party, whose numbers were very numerous. At this juncture, so well had Mackenzie's adherents kept the secret that nothing whatever of their movements was known in Toronto, nor would even the Governor have been informed of it, had not the loyalty and courage of a few individuals, at the risk of their lives, overcome every obstacle. Those gentlemen were Captain Brooks, Captain Stewart and Alderman Powell.²⁰

Part of the rebels' plans was to place guards at certain distances along the road on either side of Montgomery's Tavern, to stop any travellers and take them prisoners, until a reinforcement of men had arrived sufficiently numerous to march on to Toronto and execute their plans. Sheppard's Tavern,²¹ on the Newmarket Road, was strongly guarded, and there they detained a gentleman whom Mr. Jebb was well acquainted with. He was on his way home to Newmarket from Toronto, but finding the road paraded by armed men, and the appearance of things very critical, he called at Captain Brooks'²² house on the way, imploring him to join him with his assistance.

Although greatly fatigued, he ordered his horse, armed himself with a brace of pistols, and they proceeded together toward Sheppard's tavern, about eight miles from Toronto. They had not gone far before they discovered a vast concourse of men in the road, all well armed with rifles. One of the leaders, who was supposed to be Lount,²³ came forward and questioned them as to their place of destination. They replied, to Newmarket. Mr. Jebb, whom Lount knew, was allowed to pass. Captain Brooks was then examined. He, with great presence of mind, stated his name to be Brown, a neighbour of Mr. Jebb's, which satisfied Lount (or "Round Jacket," as he was nicknamed), and they both rode on together. They had the same ordeal to undergo with other guards, but finally reached Sheppard's, where they found Mr. Jebb's friend in custody. Shortly after Colonel Moodie,²⁴ Captain Stewart and

²⁰ Captain Hugh Stewart, Thomas Richard Brooks and Alderman John Powell, the eldest son of Chief Justice William Dummer Powell and afterwards Mayor of Toronto).

²¹ Sheppard's Tavern was built on lot 16, Yonge Street, the place being now known as Lansing, and the crossroad leading westward as Sheppard Avenue. (H.)

²² Captain Thomas Richard Brooks' house was on lot No. 8, a short way south of Hogg's Hollow, or York Mills. The locality is known now as Bedford Park, at the extreme northerly limit of the city. (H.)

²³ Samuel Lount, born in Pennsylvania in 1791 of an English father (from Bristol), while his mother was of English descent; he became a blacksmith and came to Upper Canada in 1811, settling at Holland Landing; he became a farmer and a surveyor, and acquired a modest competency. A sincere lover of constitutional government, he joined Mackenzie's ill-fated scheme; he was convicted of treason and hanged (with Matthews) at the Old Gaol, Toronto, in 1838.

²⁴ Colonel Robert Moodie, formerly of the 104th Regiment of Foot, was a veteran of the Napoleonic wars: he served in Canada during the War of 1812 and took part in the sanguinary battle of Queenston Heights. He had a large grant of land and retired on half-pay. In the Session of 1837-8, the Legislature granted a pension of

another gentleman rode up, not knowing the cause of the fracas. They consulted together as to the best course to be pursued, which they soon decided upon. Colonel Moodie, who was a determined, gallant old soldier, armed with a brace of pistols, instantly resolved that they should assist each other and proceed to Toronto, notwithstanding the apparent obstacles in the way. They rode three abreast, Captain Brooks, Colonel Moodie and Captain Stewart taking the lead, the other three following in the rear. On approaching Montgomery's Tavern they were stopped by the same individual, supposed to have been Lount, and questioned as to their destination. Moodie replied, "To Toronto." "You cannot go," said Lount, "you are our prisoners." Finding Moodie resolutely determined to work his way, notwithstanding so large an armed force, amounting then to about three hundred, he called upon the guards to do their duty and to fire. Although the distance was so short, yet, strange as it may appear, out of three rifle shots, only one took effect, which killed poor Moodie on the spot. He was caught by Captain Brooks and never spoke but once, merely repeating the word "Charge," as though engaged with an enemy himself on the field of battle. He was carried into Montgomery's Tavern and expired shortly after. In the confusion that took place it was difficult to remember the minutæ, but Captain Brooks told me he thought Colonel Moodie never used his pistols on the occasion. It was of the greatest consequence to the rebels that no one should proceed to Toronto that night. They therefore proceeded to detain the rest of Moodie's party. Captain Brooks, perceiving this, went round the house, mounted his horse and prepared for escape. He was, however, fired at the second time, but fortunately escaped unhurt, galloping off, followed by Captain Stewart. They had not proceeded farther than the toll gate (it being a new macadamized road), than they were stopped again by two persons, one of whom presented a horse-pistol and fired upon them. This was none other than Mackenzie himself, whom Brooks well knew. The other, he asserts, was Dr. Morrison,²⁵ who had spectacles on. Brooks for the third time escaped unhurt. His pistol, which he presented at Mackenzie, unfortunately flashed in the pan, otherwise the world would have been well rid of a traitor who caused the loss of life to so many of his fellow creatures afterwards. The snapping of the pistol, however, caused Mackenzie to let go the reins of his horse, by which means he escaped. In the affray Stewart got to Toronto and first gave the alarm. Brooks reached the Government House about an hour afterwards by a circuitous route, and there confirmed the melancholy intelligence of the death of Colonel Moodie.

Whilst these proceedings were carrying on, a few gentlemen had turned

£100 (\$400) to his widow and children, (1837-8) 1 Vic., 3rd. Sess., Cap. 47 (U.C.). He is not to be confused with Colonel John Moodie (Sheriff of the County of Hastings), who was on the Provincial Establishment during the Rebellion. He was also a veteran, having served in the Low Countries and been wounded at Bergen-op-Zoom. He was the author of a few sketches, but had not the capacity of his wife, Mrs. Susanna Moodie, one of the Strickland family, whose works in Canada are well known.

²⁵ Dr. Thomas David Morrison, who received a licence to practise in 1824, one of the most prominent Radicals, member of the House of Assembly, Mayor of Toronto; afterwards arrested as a rebel and tried for treason, but acquitted. He afterwards went to Rochester, but returned in 1843 to Toronto, where he lived and practised until his death. He protested against many of Mackenzie's actions and assailed him in no measured terms. Captain Brooks was certainly mistaken.

out on a reconnoitring party along the Yonge Street road. This arose in consequence of some private information that had been given. There were present: Alderman Powell, Mr. Archibald Macdonnell, Colonel Fitzgibbon, Mr. Brock and Mr. Bellingham. It appears that Mr. Powell alone was armed with a brace of pistols. He rode alone as far as the Sheriff's Hill, about one mile from the city. The others had previously gone forward. Colonel Fitzgibbon,²⁶ after reconnoitring, returned home, thinking there was no danger to be apprehended. Mr. Powell and Mr. Macdonnell, not being quite satisfied, proceeded leisurely along until they reached the eminence called the Blue Hills. There they encountered four persons on horseback, riding abreast of each other. Mackenzie, who was one of the four, armed with a large horse-pistol, advanced forward and ordered these two gentlemen to halt. His companions, armed with rifles, instantly surrounded them and said they were their prisoners. Mr. Powell demanded by what authority. Anderson,²⁷ who was one of the party, cried out that their rifles were their authority. Mackenzie then asked many questions as to the force and preparations making in town, what guard was placed at the Government House, and whether an attack was expected that night; to all which questions Mr. Powell fearlessly replied that he, Mackenzie, might go and see. This answer enraged the rebels very much, and Mackenzie immediately ordered Anderson and Sheppard to march the prisoners into the rear and hasten on the men. Anderson took charge of Mr. Powell, and Sheppard undertook to secure Mr. Macdonnell. The former went first and the latter about ten yards behind. Anderson was excessively abusive toward the Governor, and said that he would let Bond Head know something before long. Mr. Powell asked him of what he had to complain, and reasoned with him on the impropriety and wickedness of his conduct. But it was of no avail; he replied that they had borne tyranny and oppression too long, and were now determined to have a government of their own.

Having reached Dr. Horne's gate, a person on horseback met them. Anderson ordered him to halt and enquired who he was. He replied—Thomson. Mr. Powell instantly said, "Mr. Thomson, I claim your protection; I am a prisoner." The gentleman whom they accosted turned out to be Captain Brooks, who recognized Mr. Powell by his voice and said, "Powell, the rebels have shot poor Colonel Moodie and are advancing on the city." On saying this Brooks put spurs to his horse and succeeded in escaping; for, although both Anderson and Sheppard turned round to fire at him, they could not effect their purpose. Upon this intelligence Mr. Powell (who was armed, although the rebel guard did not know it) made up his mind to effect an escape at all hazards, feeling assured that the salvation of the city depended upon prompt measures. He made several attempts to fall back, which being noticed by Anderson, he said if he persisted in attempting to escape he would drive a ball through him. They proceeded in this way as

²⁶ Colonel Fitzgibbon wrote various accounts of the outbreak of Macdonnell's rebellion, the most exhaustive account of his own share in the defence of Toronto being in "An Appeal to the People of Upper Canada," published in 1847. See *MARY AGNES FITZGIBBON'S "A VETERAN OF 1812—THE LIFE OF JAMES FITZGIBBON,"* p. 186, *et seq.* (H.)

²⁷ Anthony Anderson, of Lloydtown, had been appointed to lead the Rebels with Samuel Lount; he was a man of great courage and some military experience. His death is thought to have been a great loss to the Revolutionary forces.

far as Mr. Heath's, when Mr. Powell suddenly drew out a pistol and fired at Anderson, who was riding close beside him; he fell instantly, and neither spoke nor moved afterward. Mr. Powell and Mr. Macdonnell, then rode off at full speed toward the city. Sheppard followed and fired at them, the ball whizzing between the two. Mr. Powell, finding his horse could not keep up, told Macdonnell to ride hard and give the alarm in the city.

At the Sheriff's Hill²⁸ they were again met by Mackenzie and the other guard. The former rode after Mr. Powell and, presenting his pistol at his head, ordered him to stop, on which Mr. Powell snapped his remaining pistol in Mackenzie's face, which he actually touched, but unfortunately it did not go off. Mackenzie's horse either took fright or he could not be stopped, for he ran on ahead of Mr. Powell, who suddenly drew up opposite Dr. Baldwin's²⁹ house at Spadina, up which avenue he galloped for about twenty yards, then jumped off his horse and ran into the woods.

Hearing himself pursued, he lay down for a short time behind a log, whilst a person on horseback passed by him within a few yards. At this crisis his feelings may be readily imagined as acute in the extreme, especially as some of the rebel guards had been stationed in the woods, and he did not know but they might be very numerous. There he lay and listened, and thinking his pursuer was far enough, he arose from his retreat behind the log and, running through the college fields, gained an avenue, down which he continued his course and reached the city. After informing the Governor, he went to the City Hall and performed duty for the night.

Doubtless you would like to know what became of Mr. Macdonnell.³⁰ He was recaptured at the Toll Gate and again made prisoner. I knew him well, a man of great coolness and courage, who afterward raised a company of volunteers, of whom he was Captain. Had he been armed as Mr. Powell was, in all probability Mackenzie would have been shot between the two fires.

We seldom read in history of so narrow an escape as that of Mr. Powell; for had it so happened that the latter's pistol, which he snapped in Mackenzie's

²⁸ Sheriff's Hill was better known as Gallows Hill. Sheriff W. B. Jarvis had his residence a short way above. The name Gallows Hill, however, did not have any connection with official proceedings by the Sheriff's hangman, although the term may have been applied in a facetious way. The circumstance of a fallen tree, underneath which teams had to pass when ascending through the notch, gave rise to the name "Gallows." See Scadding's "Toronto of Old," p. 425.

These operations of the insurrectionists on Gallows Hill, apart from the later conflict at Montgomery's Tavern, became the subject of some current doggerel verse at the time and for some years afterward:

"Mackenzie and his rebel band
Were beat on Gallows Hill, sir;
To Buffalo they did retreat
And said — 'We use the mill, sir.'"

(the Prescott Windmill being evidently referred to in the last line). Sir F. B. Head erroneously applied the name of Gallows Hill in his Narrative to the gentle rise of ground at Montgomery's Tavern ("Head," p. 333), and the Misses Lizars ("Humours of '37," p. 161) and numerous other historical writers adopt the same error from him. (H.)

²⁹ Dr. William Warren Baldwin, Treasurer of the Law Society of Upper Canada, a moderate Radical, father of the better-known Robert Baldwin, the original "Baldwin Reformer."

³⁰ Mr. Archibald McDonald, wharfinger, 36 Front Street, Toronto.

face, had been first levelled at Anderson, in all probability both his own life and that of Mr. Macdonnell would have fallen a sacrifice. In the excitement of the moment, and so taken by surprise as they were, it is impossible to say how anyone would act. Prudence is out of the question: fortunately, however, the drama terminated in the preservation of both their lives, to be useful afterward in the service of their country.

Mr. Powell, Mr. Stewart and Captain Brooks having succeeded in reaching the city, contrary to the plans of the rebels, which were to prevent anyone from going there that evening, the schemes of Mackenzie and his party were totally frustrated. It appears that after the encounter with Mr. Powell, Mackenzie and his guards returned to Montgomery's Tavern, where he saw the murdered remains of poor Colonel Moodie, which, so far from exciting any pity in his savage breast, gave him infinite pleasure, for he afterwards in his narrative, applauded the act. Here he assembled as many men as he could, the numbers increasing to three hundred or four hundred, armed with pikes, Indian guns, old fowling pieces and rifles. So ill-managed were all their plans that they had not taken the precaution even to procure a single cannon from the States to defend their position in case of an attack. Never was so miserable a display of what he termed patriots in the cause of Freedom. Even those few, according to Mackenzie's own statement, on the first approach of danger turned out, like Sir John Falstaff's recruits, beggarly cowards. They took to their heels with affright and ran, unfortunately for the patriot cause, the wrong way, thus verifying the truth of Hudibras' assertion—

"He that fights and runs away
Will live to fight another day;
But he that's in the battle slain
Will never live to fight again."

Every opportunity was afforded them to collect their scattered forces and to arrange their plans, it being the decision of the Governor, knowing what a miserable set they were, to leave them in their encampment until the city was placed in a suitable posture of defence. Orders were immediately issued by proclamation for the militia of the country to assemble. Nobly was that call responded to, for never was an instance on record in the annals of history where a whole Province was so speedily up in arms for general defence, thus evincing to the world that so far from the inhabitants generally wishing for any change in the constitution, they were determined to fight for it to the last, in defence of their property, their wives, children and their country.

On Tuesday morning all was bustle and excitement. The Governor was armed in the Market Square with a musket like any private volunteer. He delivered an address to the people there assembled, calling upon them to co-operate with him in one common cause, and to defend the standard of their country against all who should dare to invade it. The enthusiasm of the citizens was unbounded: they rallied as if by magic, and by nine o'clock a sufficient number of armed volunteers had assembled to defend the garrison, banks and other public institutions, which the rebels had threatened to destroy. Steamboats were despatched to Hamilton and Niagara for volunteers, who promptly obeyed the call, and returned the following day laden with troops. Colonel MacNab, the Speaker of the House of Assembly, raised at Hamilton two hundred men in a few hours; Colonel Chisholm, of Oakville, a similar

number: Sheriff Hamilton also returned with ninety-five from Queenston and Niagara. They all landed nearly at the same time amidst the cheers of the citizens, and marched up to the City Hall, were received, and received their arms and accoutrements, with ten rounds of ammunition each. Companies of men from all quarters kept pouring in, so that by Thursday morning upward of four thousand stand of arms had been given out for the service. Whilst these loyal fellows were on their way from different districts to the capital, the rebel party were scouring the country, setting fire to houses and committing depredations and plunder, the only course left them to pursue. They literally turned out a band of marauders, headed by Mackenzie himself, the puny hero of Patriotism, who revealed his real character by committing acts of incendiarism disgraceful to an English Turpin or the celebrated French robber whose head in wax you may recollect my mentioning having seen in Trinity College, Dublin. In these men some principle of honour was developed. Not so with Mackenzie, who stands conspicuous as the high priest of incendiarism and buccaneering. A party of about two hundred, headed by Mackenzie himself, came down to the Toll Gate, about one mile and a quarter from the city, and set fire to Dr. Horne's house within a short distance of it, which was totally consumed with all his furniture and outbuildings. It was a deliberate and premeditated act, performed by Mackenzie himself, whilst his reckless crew calmly looked on. He even broke up some of the furniture in the rooms and threw it, with the Doctor's papers, upon the flames which he had kindled. The reason he assigned afterward was that it was a rendezvous for his enemies. The Doctor was in the city at the time, and the family had fled on the approach of the banditti. On some of the neighbours expressing a desire to save the furniture, Mackenzie ordered his men to fire upon any one who should make the attempt. Had any of the family been present, he declared he would have served them as he had done an unfortunate dog which was left on the premises. The manservant begged to take away his clothes, but this even was refused by the "people's friend," as he styled himself, who, could he have played the violin, would have done it as calmly as Nero did when Rome was burning. Sheriff Jarvis's beautiful villa would have shared a similar fate, had it not been for the intercession of Lount, who stated that he had received some personal favours from the Sheriff and on that account would not accede to it. Mackenzie alleged it was spared because they had no proof that it was a rendezvous for their enemies, but the actual fact was Lount's expostulation (with whom Mackenzie did not wish to quarrel), and on this account there is one redeeming trait in his character, bad as it was. Acts of incendiarism were even sanctioned and encouraged by Dr. Rolph, the head of the executive, who advised the conflagration of the city itself as the best means to ensure success.³¹ Yet this very (same) Doctor Rolph was one selected by the Governor to proceed with a flag of truce in company with Dr. Baldwin to ascertain what the rebels wanted. I apprehend, however, that there was policy even in this selection, as the Governor was well aware of Dr. Rolph's principles, although he did not anticipate he was so great a rebel as he afterward proved to be. The object the Governor had in view was to induce the rebels quietly to disperse, to spare the effusion of

³¹ This seems to be unfounded; there is still doubt as to Dr. Rolph's part in the unfortunate outbreak.

human blood. They accordingly proceeded to headquarters and held a conference, which terminated, as might have been expected with two such representatives, in an insolent proposal of terms to which no Government could accede, not having the power to make the people more independent than they might be, if they chose, already. Startling as the assertion may appear, Dr. Rolph, during this mission, actually took one man prisoner, whom he handed over to Mackenzie's guard for custody, and this at a time when he was bearing a flag of truce from the conference to his Governor. Doubtless his duplicity was suspected and the Governor considered he might commit some overt act of treason whereby he might be apprehended, otherwise he would never have selected an individual whom he had publicly refused to admit into his councils. He absconded shortly after and took refuge in the neighbouring state. In the evening a piquet guard consisting of thirty-two men, under the command of Sheriff Jarvis was posted on Yonge Street for general observation. They were attacked by Mackenzie's riflemen, but happily without the loss of any lives. The fire was promptly returned by the piquet guard, which drove the assailants back, leaving behind them one killed and several badly wounded. Some of the rebels had pikes made by Lount the blacksmith, then general in command, which they had no occasion to use, for after the firing of our men, according to Mackenzie's account, "they took to their heels with a speed and steadiness of purpose that would have baffled pursuit." I quote his words to show the mean opinion he had himself of his own forces. A few of these renegades reached headquarters, where they remained for the night, determining on the following morning, Wednesday, to act on the defensive. Patriotism, in the hour of danger, is a momentous word; at least it proved so in this instance, for they were given to understand that gentlemen of influence who had pledged to join them, wisely kept aloof. Even the executive who had commanded them to make the premature and unfortunate movement came not, neither did they correspond, and for a very good reason. They had, like their unfortunate brethren in arms, quietly decamped for fear of being taken prisoners. This disaffection Mackenzie considered inexplicable, yet two days afterward he pursued the same course himself, after he had tried his skill as a thief and a robber.

Not relishing the intelligence from the city, and fearing an attack, he thought the wisest plan would be to move off to some other neighbourhood. Accordingly, on Wednesday morning, the 6th, he accompanied a party to Dundas Street in search of plunder. Here they waylaid the great western mail, which they robbed with impunity, taking the driver and passengers prisoners to their camp—a great feat truly. So badly off, indeed, was Mackenzie himself, and having the idea of escape before his eyes, that he even stooped to the meanness of abstracting the passengers' money, which, although denied by him afterward at Buffalo, was proved by the testimony of respectable witnesses, and particularly by Thomas Cooper of Toronto, who was travelling that route on horseback. Mr. Cooper's affidavit was implicitly believed, he being known as a man of integrity and principle. He stated that he was taken prisoner and very roughly treated: his purse was handed to Mackenzie, who counted the money, amounting to forty-five dollars, three of which he generously returned, after seizing his horse, saddle and bridle. From Mr. Armstrong, his travelling companion, he also took a horse, saddle

and bridle, as well as four dollars in money, one pound of tea and four pounds of coffee. At the house where he was staying, he even had the meanness to open the servant girl's trunk and take away fifteen dollars in money and her clothes,³² which she entreated him to return, but in vain. In these clothes he doubtless escaped, as no other reason can be assigned for his keeping them, although the poor girl went on her knees and begged him to return them. He also stole half a dollar from a poor wretch who was travelling on foot. This was previous to the arrival of the mail. What his prize was then has never been ascertained, but supposed to be considerable, as a day seldom passes without the conveyance of money. After this deliberate act of robbery, he returned to headquarters and amused himself with reading the letters and papers, some of which he handed over to the prisoners for perusal. Some of the letters he carried with him to Buffalo, which he read aloud to a large audience who collected together to hear the ill-fated account of his unsuccessful project.

On Thursday morning, their energies were nearly exhausted, but as a last resource, a renegade Dutchman of the name of Van Egmond,³³ who had formerly been a plunderer in Napoleon's army, was despatched with forty riflemen to go and burn the Don Bridge, so as to cut off the communication with the Montreal Road. There being no guard there on his arrival, the work of incendiarism was commenced by burning the Widow Washburn's house contiguous, shooting a poor, defenceless woman, and robbing the mail. The burning of the bridge was not accomplished, in consequence of a reinforcement having arrived from Toronto, who speedily extinguished the flames. Mackenzie himself was also present, as Captain Brooks told me he had the impudence to hand over some letters to a gentleman of the party,³⁴ stating that the day was come when letters went through the country free of postage. How he escaped then from being shot has astonished many since. But he seemed like Mephistopheles,³⁵ who could disappear at the instant of danger.

At this juncture, a large reinforcement arrived at Toronto from Hamilton, Niagara, Cobourg, Oakville, Whitby, Scarborough, and other districts, of whose movements he doubtless obtained information, which induced his party to make good their retreat to headquarters. No time was lost in the city after the arrival of the volunteers, to prepare for a general dislodgement of the rebels, whose numbers, from exaggerated accounts, were greatly overrated. It was nevertheless an act of prudence to prepare for the worst. The arrangement for the attack devolved upon that gallant and experienced officer, Colonel Fitzgibbon. The men, being in excellent spirits, contributed not a little to the success of the undertaking, and when they found the Governor was to lead them on in person, their enthusiasm knew no bounds.

³² The story of the servant girl's clothes was denied. It is an example of the numerous contradictory accounts in the current gossip of the time. Coventry complains that such contradictory accounts reached them at Chippawa. (H.)

³³ Van Egmond.—A full account of Colonel Anthony Van Egmond's career and of his participation in this rebellion, may be found in Miss Lizars' "In the Days of the Canada Company," p. 110, etc., and references also occur, in the same work, to his two sons, Edouard and Constant. See also Dent, Vol. II, p. 13 (footnote). (H.)

³⁴ There is a note on the margin in Coventry's handwriting—"Enquire of Brooks further about this." (H.)

³⁵ Mephistopheles.—The text in the MS. has Mephistoeles, evidently a slip of the pen. (H.)

The advance guard consisted of three companies of young gentlemen of the city, with some discharged soldiers, commanded by Lieutenants Garrett, Coppinger and Nash.

The main body consisted of eight hundred men, composed of volunteer companies who had arrived that morning and the preceding day under the command of their respective captains.

Two companies of artillery, with two brass field-pieces, under the command of Captains Lackie and Stennett.

One troop of cavalry commanded by Captain Chalmers.

The right wing of two hundred men, commanded by Colonels Jarvis and McLean.

The left wing, composed of two hundred men commanded by Mr. Justice McLean,³⁶ formerly Colonel in Cornwall.

On arriving within sight of the rebels' headquarters, Montgomery's Tavern, they were seen in great numbers upon the hill occupying the main road. The principal ringleaders were present, consisting of Mackenzie, Silas Fletcher, Lount, Gibson and Van Egmond. Being informed by one of their guard that the Royalists were approaching, Mackenzie asked his men if they were ready to fight a greatly superior force, well armed and with artillery. They replied, yes; then said Mackenzie, "Go to the woods and do your best." About one hundred advanced at a quick pace down the hill, followed by the main body. Our troops in the meantime prepared for action, but before the cannon could be brought to bear, the rebels ran into the woods, from whence they opened a smart fire, but unsuccessfully. Justice McLean's company attacked them on the right and completely routed them. The artillery then moved toward Montgomery's Tavern, a very spacious frame building, with extensive stabling and outhouses adjoining. This place, as I observed to you before, was the rebels' headquarters. Here they had in custody fifty-four prisoners, whom they seized whilst travelling from the country to Toronto or *vice versa*. On the approach of our troops they were removed a short distance away, under the charge of Gibson, who was a member of the House of Assembly, but a notorious rebel, whose house Mackenzie generally made his headquarters for disseminating sedition around the country. Thinking it best to dislodge the residue of the rebels who remained in Montgomery's house, three rounds were fired through the building, which effectually discomfited them. Our troops then entered, where they obtained Mackenzie's papers and several flags, decorated with stripes and stars. One on a red ground bore the inscription, "Victoria the 1st and reform"; on the other side, "Bidwell and the glorious minority."³⁷ Mr. Bidwell was an eminent lawyer of considerable talent, and, having been disappointed at not obtaining the appointment of Attorney-General, was supposed to have co-operated in the furtherance of the present rebellion. No positive act of treason, however, being proved against

³⁶ Afterwards Chief Justice Archibald McLean.

³⁷ The complete form of the second legend, as given by Sir Francis Bond Head ("Narrative," pp. 322, 365, etc.), was: "Bidwell, and the glorious minority, 1837, and a good beginning." (H.)

him, he was allowed to banish himself to the States, which he did accordingly a few hours afterward.³⁸

Gibson,³⁹ who had charge of the prisoners, was so closely pursued that he fled into the woods and made his escape to the States, where he now remains with the satisfaction of the loss of his property only, that having been confiscated. A party in advance, in pursuit of other rebels, having reached his house, in the moment of excitement against him, set fire to the building, which was totally destroyed. This was much against the Governor's wishes, but it was impossible to restrain the ardour and enthusiasm of our troops, who considered at the moment they were rendering a service to their country. Having a short time before passed the smoking ruins of Doctor Horne's house, and thinking he was accessory to that act of incendiarism, (which in all probability he was), our troops considered it no other than an act of retaliation, but it was ill-judged and imprudent to say the best of it. Our neighbours in the States have stigmatized the Governor as being implicated, but it was an act furthest from his wishes. Nor was he there at the time. Montgomery's Tavern, also, shared a similar fate,—a rash act done in the ardour of the moment, by an individual who swore it should never harbour traitors again. He raked the burning wood from the different fireplaces on to the floor, and in a short time the whole immense range of building was one mass of flame. The Governor, as well as hundreds of bystanders, were astonished at the sight, it bursting upon them so unexpectedly. The act, however, was done, and having no power to subdue the raging element, it was left to its fate. In the skirmish the insurgents had 8 killed and 13 wounded. On our side three men only, wounded. During the confusion Mackenzie, Silas Fletcher and Van Egmond pushed on to a valley called Hogg's Hollow, where they held a consultation which resulted in the impossibility of collecting their scattered forces. They therefore wisely resolved to adopt the motto "*Sauve qui peut.*" Van Egmond, however, was taken prisoner and died in jail before his trial could come on.⁴⁰ Fletcher ran one

³⁸ Marshall Spring Bidwell, a lawyer of great eminence, had filled the chair in the House of Assembly and was acknowledged as a distinguished leader in public affairs. Had it not been for the wrong-headedness of Sir Francis Bond Head, Bidwell would have been elevated to the Bench; as it was he voluntarily retired to the United States. He practised law in New York for many years and achieved eminence at that Bar of very great men. He refused to return to Canada, although solicited to do so by Sir John A. Macdonald, and died in New York, October 24, 1872.

³⁹ David Gibson, a land surveyor, living near the present Willowdale; of Scottish descent, he was a man of high character and much respected by his neighbours. He became a Member of the House of Assembly and took a very prominent place in the counsels of his Party. His house was burned, it is said, by order of the Governor, but he escaped to the United States, settling at Rockport. Pardoné in 1843, he returned to his farm on Yonge Street, where he lived in peace and good repute; he died at Quebec, Christmas Day, 1864.

⁴⁰ Colonel Anthony G. W. G. Van Egmond, a native of Holland, had served under Napoleon; he resided in the "Huron Tract," in what is now the County of Waterloo, where he owned considerable land, and he was a rich and prosperous man. Being of advanced political opinions, he took part in Mackenzie's schemes. As he was born in 1771, at this time he was sixty-six years of age; in the Jail he was attacked with inflammatory rheumatism, and he was removed to the City Hospital on the block bounded by King, Adelaide, John and Peter Streets, where he died before he could be tried.

way⁴¹ and Mackenzie, mounted on a very fleet horse, made his escape another. He was closely pursued by Messrs. Maitland and McLeod,⁴² Captain Matthews, Colonel Halkett⁴³ and Colonel Fitzgibbon. The two former gentlemen, who were well mounted, rode like fox hunters in pursuit of the brush. At one time they were close at his heels, but he eluded their grasp and ultimately secreted himself in the woods at the back of Sheppard's Tavern, from whence he made his escape to Buffalo, where he arrived three days afterwards. Mr. McLeod told me nothing but the fleetness of Mackenzie's horse saved him, he being determined for one, to do his utmost toward bringing him to justice. Five or six shots were fired at the pursuers, but happily took no effect.⁴⁴ Thus ended that memorable day's proceedings, which for a time restored tranquility to the city and its vicinity.

A large number of the rebels who were taken prisoners were humanely released by the Governor and allowed to go to their homes, at the same time appealing to their feelings on the impropriety of their conduct, and his hope that a sense of gratitude for their liberation would prevent them acting in future, in opposition to a government which was at all times desirous to act upon principles of humanity and forbearance.

Our troops behaved with the greatest courage, numbers of whom shortly after returned to their homes, with the satisfaction of having faithfully discharged their duty in having so promptly crushed a rebellion in the bud, which, had it been allowed to get a head, would have crippled the energies of the country and deluged a fertile Province with blood.

⁴¹ Silas Fletcher had hitherto been a farmer of lot No. 22, concession 3, East Gwillimbury township, a few miles north of Newmarket. He escaped at this time to New York State, as did likewise his kinsmen, William and Daniel Fletcher. Ultimately he settled at Laona, Chautauqua County, some ten miles south of Dunkirk, and did not return to Canada. £500 reward was offered for his apprehension. A letter from him in 1840 appears in Lindsey, vol. II, p. 72 (footnote). (H.)

⁴² Deputy Sheriff McLeod had a few months before, in the fall of 1837, given the order to fire to the military guard which was conducting the escaped slave, Solomon Moseby, from the Niagara Gaol to the Ferry across the Niagara, to be delivered up to the U.S. authorities. The march had been blocked by some hundreds of negroes determined to prevent the delivery up of Moseby to certain torture and death. The guard killed two of the insurgents. See my paper, "The Slave in Upper Canada," read before the Royal Society of Canada, May, 1919, published in the *Journal of Negro History*, Washington, D.C., 1919.

McLeod afterwards, in 1841, was tried in Utica, New York State, on a charge of murder arising out of the *Caroline* episode; he was acquitted, as it was proved that he did not take part in the expedition. See my article, "An International Murder Trial," *Journal of Am. Inst. Criminal Law and Criminology*, Vol. X, No. 2 (August, 1919), pp. 176 *seqq.*

⁴³ Lieutenant F. Halkett, formerly of the Coldstream Guards, the person referred to here, was aide-de-camp to the Governor. After his first selection by Sir F. B. Head for this office (Head, p. 29), the appointment was cancelled (*ib.*, p. 30), but Lieut. Halkett accompanied the Governor to Toronto as a guest, and the appointment was restored five months later (p. 419). (H.)

⁴⁴ At the time of the rebellion, the late Mrs. Archibald Jardine, of Beaverton, Ont., then a young unmarried woman, was employed as servant at Jacob Snider's house near the Montgomery Tavern. She informed the writer of this note (June 10, 1906) that on the day of the battle she gave Mackenzie and the other leaders their breakfast in the morning. "After the battle, Mackenzie," she said, "was the only one who returned to the stable of the Montgomery Tavern for a horse; the others fled on foot." This corroborates and somewhat elucidates Coventry's account of Mackenzie's escape. See Mackenzie's own account of his escape in Lindsey, Vol. II, pp. 102-122. (H.)

Every exertion was made to find the ringleaders, but in vain. So prompt were their movements in escaping, that justice was outwitted. Gibson moved north and succeeded in escaping on board a schooner from Presqu'Isle. Lount was concealed by one of the party for upward of three weeks, but was at length taken in a singular manner.⁴⁵ A boat was provided to carry him over to the States, manned by three men who were friendly to his cause. A violent storm coming on, they were driven from their course to the mouth of the Grand River. They landed about 12 o'clock at night, and knocked at the door of a small tavern, the landlord of which was known to one of the men, who worked in a foundry. He hospitably took them in shivering with cold, provided them with beds and a good breakfast in the morning, after which they again started, as the storm had abated. Previous to going, the landlord told this man whom he knew he was glad he had arrived as he wanted to see him relative to a plough he required cast. The man pretended he would attend to it as soon as they would return from the opposite shore, whither they were going for salt. Not knowing Lount or the rest of the men they proceeded, but had not gone far before they got entangled in the ice, vast quantities of which, during the winter season, collect at the mouth of the Grand River. Here they were observed by some gentlemen who have formed a new settlement along the lake shore, of whom my friend Mr. Cook is one, altho' he was not present on this occasion. Some planks were obtained and the men safely landed, leaving the boat to the mercy of the elements. They were not known, but (it) being a disturbed time and a rare occurrence at that season of the year to see an open boat on the lake, suspicions arose that they must be some of the rebel party making their escape. Accordingly they were taken before a magistrate, examined, and not giving a satisfactory account of themselves, were forwarded to Chippawa, where Lount was first recognized by a gentleman there who knew him. One very suspicious circumstance observed by the captors, was the witnessing Lount's anxiety to get rid of a bundle of papers which he pushed under the ice with one of the oars, and thus irrecoverably lost. He was removed to Toronto, examined, and fully committed for trial, the result of which I shall mention to you in due course.

Gilbert F. Morden, another individual, was taken prisoner at Grimsby and fully committed. On his examination he deposed to the course taken by several others who stole a boat on the lake shore, intending to proceed to Fort Niagara on the American shore. But a violent storm arising, they put into a creek about four miles from Niagara and ultimately succeeded in escaping through the woods, to reach the bank of the Niagara River, from whence they crossed over to Grand Island and finally escaped. This party was believed to consist of Mackenzie's son, Silas Fletcher, Goreham,⁴⁶ nephew to

⁴⁵ The capture of Samuel Lount and this party occurred at Hyde's Point, two miles and a half west from Port Maitland at the mouth of the Grand River, January 18, 1838, Messrs. Hyde and Imlack being the persons who overtook them with the boat. After exposure in an open boat for some days trying to cross Lake Erie, the party had become famished and shivering. (H.)

⁴⁶ A sister of Samuel Lount was the first wife of Eli Gorham, proprietor of the early woollen factory in Newmarket, Ont., but she died early in the nineteenth century without issue. By a second wife, however, Eli Gorham's eldest son was Nelson Gorham, the person mentioned here. He was therefore not a nephew of Samuel Lount, unless by courtesy of language from his father's earlier marriage. Nelson Gorham, although not present in the conflict at Montgomery's, was indicted for high

Lount, and Jesse Lloyd. Mackenzie himself was to have joined them, but ultimately took another direction. He went more inland, proceeding to Smithville and the Short Hills, through the woods to MacAfee's, a farm house about eleven miles from Chippawa, opposite the upper end of Grand Island. Here he was paddled over in a canoe and ultimately reached Buffalo, as he says himself, after travelling three days, and one hundred and twenty-five miles. On his route, he was once stopped by a sturdy farmer, who challenged him as a horse stealer, from his being so well mounted and his own personal appearance so disguised and dirty. In all probability he had stolen it, having stolen two before, verified upon oath at the time he robbed the mail. Mackenzie, however, would not admit it but took out a pistol and threatened to shoot him if he did not let go his horse; at the same time bound him down by a dreadful oath not to say one word of the affair or create any alarm as he was Mackenzie himself. The oath he had taken preyed a good deal on the poor fellow's mind, who was relieved by one day meeting a magistrate to whom he mentioned the circumstance, without alluding to Mackenzie. The magistrate assured him that such an oath, taken under those circumstances with bodily fear, was not binding, and thus he revealed the route of the traitor. It was, however, then too late to intercept him. A reward of 4,000 dollars was out for his apprehension, altho' the party who had him in possession was then totally unaware of it. He travelled part of the way in waggons, and it was currently believed that on his arrival in the vicinity of Cook's Mills, (a radical district), that he was dressed in women's clothes, from the circumstance of a suspicious character calling at that time to ask for refreshments at a farm house, the inmates of which pressing the lady to stay, she declined and went on, altho' the night was extremely dark and gloomy. They since told a friend of mine they were certain it was a man, altho' they never could discover who the person was. But three days afterwards we heard of his arrival in Buffalo. In a short narrative that he published afterward, relative to the operations of the three days, he has studiously avoided saying anything relative to his escape, altho' he has mentioned the names of many with whom he was connected. As he could not tell whether they had all fled, it was an act of gross baseness to betray them. Entertaining, as I do, and always have done, so mean an opinion of his character, I think it highly probable he will some day divulge the particulars of his route, and implicate, as he before has done, the very individuals who fostered him on his journey. For having doffed the lion's mane, and hung a sheepskin on his recreant limbs, there is no further reliance to be placed on his conduct, even toward his cloyant friends. This I firmly believe from the circumstance of his having told a friend of mine in Buffalo that there was only one man in Chippawa whom he could implicitly trust, whose name he mentioned. His duplicity also to Robert Gourlay, Esq'r, cannot easily be forgotten. Finding he could not make a rebel of him (although he entangled him so closely in the net of rebellion that he was banished the country),⁴⁷ he left him unheeded to his treason and left Canada at this time. (See Lindsey, Vol. II, p. 399, No. 26.) He afterward settled in Chautauque Co., N.Y., where he remained until after 1853, and subsequently returned to Canada. (H.)

"This is wholly untrue: Gourlay was banished in 1819; Mackenzie came to Canada in 1820 and began his public career in 1824. They were not concerned in any way, and Gourlay held Mackenzie in contempt. See my Life of Gourlay, published by the Ontario Historical Society, "Papers and Records," Vol. XIV. See also Note 48, *infra*.

fate. Not that Gourlay cared for the sympathy of Mackenzie one iota, but it never was his wish to carry his principles of independence further than the reform of what he considered a few abuses. I hope the day is not far distant when that gentleman, who has seen his errors, will be recalled from banishment, for he has now experienced, to use his own words, that—"During four years residence in the United States I have witnessed far worse than European domination—the domination of the worst of passions;—mobs, murders, sacrilege and profanity of every kind."⁴⁸

In his last letter to Mackenzie, since his escape to Buffalo, he tells him that "Joseph Hume is a little man, but you less. You call yourself a patriot, yet you fly from home to enlist scoundrels for the conquest of your country. This is patriotism with a vengeance. You had no right to take up arms, and had you succeeded, so far from rejoicing, I would have turned my back upon America for ever."

I now leave Mackenzie to rest himself at Buffalo, and call your attention to our proceedings at home after his departure. The first act of the Governor after the dispersion of the rebels was to issue a proclamation to the Queen's faithful subjects.⁴⁹ He told them that although the country had been long suffering from the acts of concealed traitors, yet this was the first time that rebellion had openly avowed itself; that a concealed traitor was the most dangerous of all enemies; that they should be rooted out of the land, and he hoped that none who were loyal would rest until this was accomplished; that in furtherance of this object he offered rewards for the apprehension of the ringleaders, to wit:—

\$4,000 for William Lyon Mackenzie, the principal.

\$2,000 for David Gibson, Member of the House of Assembly.

\$2,000 for Samuel Lount, blacksmith, who made the pikes.

\$2,000 each for Jesse Lloyd⁵⁰ and Silas Fletcher, instigators of the proceedings, and present at the engagement on the 7th of December.

\$2,000 for Dr. John Rolph, who recommended the burning of the city.

\$2,000 for Dr. Charles Duncombe, Member of the House of Assembly, who corresponded with Joseph Hume.⁵¹

⁴⁸ This, together with the words quoted immediately below, is contained in a letter to Mackenzie from Cleveland, Ohio, January 14, 1838, in answer to a letter purporting to be from Mackenzie at Navy Island, January 8, 1838, but which Mackenzie afterward said that he neither wrote nor authorized. It will be found *in extenso* in the "Neptunian," Part 2, p. 17. See my Life of Gourlay, p. 88.

Gourlay's letter to Joseph Hume rebuking him for writing to Mackenzie the notorious letter containing the passage "baneful domination of the mother country," was written from New York in June, 1834.

Mackenzie and Gourlay had never met until 1833, although Gourlay countenanced him for more than three years, 1829-1832; he "sprung out of one," Gourlay said, but Gourlay had no respect for him. See The Neptunian, Part 2 and elsewhere.

⁴⁹ The Proclamation appears *verbatim* in a footnote in Lindsey, Vol. II, p. 96; it contains rewards for only the first five mentioned by Coventry. (H.)

One of the originals is in the possession of George G. S. Lindsey, Esq., K.C., grandson of Mackenzie.

⁵⁰ Jesse Lloyd, of Lloydtown, acted as messenger between the Rebels of Upper Canada and those of Lower Canada; he joined the rising in Upper Canada in December of 1837, and escaped to the United States.

⁵¹ Dr. Charles Duncombe was a native of the United States. Born in New Jersey about 1796, he came with his parents to Upper Canada during the progress or immediately after the War of 1812, and settled in the London District.

\$1,000 for Eliakim Malcolm, miller.

\$1,000 for Finlay Malcolm, miller.

\$1,000 for Robert Alway, Member of Parliament.

\$400 for James Anderson, shot by Mr. Powell.

\$400 for Joshua Doan.

Alway and Malcolm were taken prisoners on their way to the west to join Dr. Duncombe, and sent off to Hamilton jail. Van Egmond, who owned a large tract of land near Lake Huron, was captured on the route of the rebels, and died in prison soon afterward from chagrin and vexation, a lesson to all restless individuals who, when they seek an asylum in a foreign country, should live contented under the existing laws, or return to the land that gave them birth.

Whilst these movements were going on in Toronto, Dr. Duncombe was concocting measures for revolt in the west, which, according to the time specified by Mackenzie, took place in that quarter. The poor deluded victims, who had nothing to gain by these operations, and who only acted through the instrumentality of an artful and designing few, had to bear the brunt of the contention, whilst their ignoble leaders cowardly took flight and left them to their fate. In consequence of this known disaffection, and idle fellows congregating around, it was considered advisable to send up a force to put a stop to their proceedings. Accordingly, Colonel MacNab, Speaker of the House of Assembly, was deputed to take the command.

Although the season of the year was very inclement, yet the volunteers joined his standard with alacrity. They displayed a courage and ardour rarely to be met with in cases of so sudden an irruption. But they well knew they had enlisted in a cause wherein the best interests of the country were at stake, as well as their future peace, quietude and happiness. Accordingly, no sooner was it known that the expedition was to march than hundreds flocked to the standard. From 300 to 400 proceeded west and reached Brantford on the Grand River in perfect order and good spirits. Here they were joined by 150 volunteers and 100 Indian warriors under their commander, Captain Kerr,⁵³ who married a daughter of the celebrated chief, Brant. The rebels, about 400 strong, hearing of their arrival, decamped during the night. A large collection of letters and papers, principally belonging to Dr. Duncombe and Eliakim Malcolm, were found in a field and safely secured by Colonel MacNab. The following morning our troops moved on, and regretted they had no opportunity of coming up with the enemy, who, it was greatly

Studying medicine, he was admitted to practice in 1819, and settled as a practitioner near Bishopsgate on the Town Line between Burford and Brantford. He soon acquired a large practice and great influence in the community. He was, perhaps, the most prominent rebel after Mackenzie himself. When Member of the House of Assembly for Oxford, he went to England on a mission for the Rebels; he joined in the rebellion and was a main leader in the western part of the Province. He escaped to the United States. When pardoned in 1843 he returned to Upper Canada for a very short time, and then returned to the United States, going to the Western States and ultimately to California, where he resided until his death.

⁵³ Robert Alway, Member for Oxford with Dr. Duncombe, was captured and imprisoned; he was afterwards released on finding security for good behaviour, as was Elias Moore, Member for Middlesex.

† Captain William Johnson Kerr was the son of Dr. Robert Kerr, of Niagara, who married a daughter of Mollie Brant, the sister of Joseph Brant, and the "Indian wife" of Sir William Johnson. He married Elizabeth, the youngest daughter of Joseph Brant.

feared, had dispersed and the leaders fled without giving an opportunity for action. This afterward proved to be the case. Our forces continued to move through the disturbed districts, and in two days they received an accession of 1,000 more volunteers, so anxious were the loyal and quiet settlers to rid the country of so great a scourge to its prosperity. Their arrival in the Township of Oakland, and the appearance of this large force parading the country, altered the general temperament of the disaffected, who sent in deputations to Colonel MacNab requesting permission to surrender their arms rather than risk their lives in a cause which they found was misrepresented to them. They stated that they had been greatly deceived and basely deserted by Dr. Duncombe, Malcolm and their colleagues.

In the Township of Norwich, upward of 200 of the rebels and disaffected assembled in a square formed by our volunteers, where they laid down their arms, promising faithfully to become good citizens and faithful subjects; that they had been deceived, and had no real grievances. By instructions from the Governor to Colonel MacNab, they were permitted to return to their homes and families, on the express condition that they should surrender if any further complaints appeared against them. The lenity shown them will, it is to be hoped, operate as a warning for the future, and teach them this lesson that industrious habits and peaceable lives tend more to true happiness than meddling with politics with which they are but little acquainted. It is no wonder that the people who had joined Dr. Duncombe's standard should become disgusted when they found he had united the character of robber with that of assumed patriotism. That faithless individual stooped at nothing in order to carry his measures. The farm houses of the loyalists were indiscriminately entered and plundered of blankets, caps, arms, ammunition, and provisions. When he found he was hotly pursued, instead of sharing the fate of his associates in robbery, and throwing himself, as they did, on the mercy of lenient conquerors, he treacherously fled from danger, leaving his deluded followers to bear the brunt of public ignominy and humiliation. There was too noble a spirit, however, in the pursuers to triumph over a fallen enemy, who rather shed a tear of pity for their misfortunes than trample upon them during that eventful moment of humiliation, when they sued for mercy, thus fulfilling the declaration of our inspired Bard of Avon, who says:—

“The quality of mercy is not strained,
It falleth like the precious dew from heaven,
It blesseth him that gives, and him that takes.”

So far from either Mackenzie's or Duncombe's assertions being true that nine-tenths of the Province were favourable to their measures, it turned out precisely the reverse, and proved by the foregoing pages that nine-tenths were favourable to the existing government. In some districts they were loyal to a man. The magistrates of Barrie, consisting of gentlemen of the highest respectability, publicly avowed that the whole population in their vicinity arose en masse to put down rebellion wherever it might be found, leaving the women and children to take care of their houses and farms. But their services were not long required, for order and tranquility were soon restored after the subjugation of Doctor Duncombe's adherents. It was also gratifying to reflect that all this was accomplished by the ardour and enthusiasm of the people themselves, without the assistance of hiring soldiers as they termed

them, not one of whom was at that time to be found in the Province. After the insurrection in the west was quelled, and those who had not surrendered their arms had retired to their avocations, Colonel MacNab spent a few days in various districts, organizing companies of militia who had freely volunteered their services for public duty. Although the alarm had in a great measure subsided, yet it was impossible to tell how many concealed traitors might remain in the country. The organization, therefore, of volunteers was adjudged to be a salutary measure as a corps of observation until the arrival of troops from abroad. The disturbances in Lower Canada were not sufficiently quelled to allow any of the regulars to move at that period, so that the security of Upper Canada depended wholly on the loyalty of its inhabitants, to whom the greatest praise is due for their promptitude in coming forward so cheerfully and manfully to avenge the infraction of their laws, and to protect their property from the devastation that awaited them from a band of lawless miscreants. After making the necessary arrangements, the gallant Colonel returned to Hamilton with his troops, amidst the cheers and enthusiasm of the loyal citizens. Thus the men of Gore, who had been stigmatized by Mackenzie as a low, mean set, were among the very first to retaliate for so gross a libel on their bravery and courage, and to shew the insignificant traitor that they could accomplish what he did not much relish, for they dispersed his faction in the west altogether.

At Oakville, Toronto, Scarborough, Port Hope, Cobourg, Peterborough, Cornwall, Kingston, and all places along the lake shore, the greatest activity prevailed, accounts having reached many of those districts of a most exaggerated nature. This was the more readily believed, from the late disturbances in Lower Canada. So far, however, from damping their ardour, they manfully came forward in the general cause, and enrolled themselves under the banner of defence. Gentlemen and merchants of the first standing in society kept guard at night along the coast in unison with the poorest peasant in the land. All distinction was waived and absorbed in the one vital question of freedom under a lenient government, or tyranny under a democracy.

Nor was the Niagara district, in which I have been located since my residence in the country, behindhand in co-operation. Queenston, Niagara, Thorold, and St. Catharines responded to the call, and were soon equipped for service. Altho' the village of St. Catharines is small, yet it raised one company of foot under the command of Captain Adams, and two companies of horse under the respective commands of Messrs. Rykert and Macdonald, who were shortly after gazetted as captains. The boys even formed a company and organized a band of music, highly creditable to them. The ladies also shared in the general feeling, and evinced great presence of mind on the occasion. Being left so frequently at home by themselves, during the absence of their husbands, brothers and friends, they prepared for their defence in case of any attack from the rebels. They practised pistol and rifle shooting, and even mounted guard with muskets. One lady declared to me that she had no fire-arms in the house, but, that if any rebel came near her, she would knock his brains out with a poker. Those advanced in years participated also in the enthusiasm that prevailed. Sheriff Merritt, who had faithfully served his country during the former war with the States, when he heard of the base attempt to undermine the rising prosperity of the country by a band of lawless rebels, prepared to join the volunteers on their expedition

to Toronto. He was with difficulty dissuaded by his relatives from going, on account of his age, but at length acceded to their request, though very reluctantly. It was, however, apparent that his heart was with them on their progress, which was fully evinced afterward when they returned victorious.

Never was a scene so full of enthusiasm, sufficient to convince any hostile country how difficult it would be to overrun the fertile soil of Canada, or destroy that feeling of loyalty for its Government, under whose protecting power the people have so implicitly relied and lived so happily. As this is a country with which you are but little acquainted except by books, which give but an indifferent account of it, I have deemed it necessary to enter more fully into particulars than may be considered requisite. Should I, however, begin to write prosy, you must pardon me on account of my feelings being actuated by the impulse of the moment.

I now return to my Chippawa friends, from whose residence I shall furnish you with a detail of our operations in that vicinity. Picture to yourself the magnificent River Niagara, near three miles broad, within sight of the Falls, and subdivided by two islands nearly opposite Mr. Ussher's; you have then an idea of my location. Navy Island opposite the house, half a mile distant, contains 300 acres of land. It is partially cleared and has been for several years inhabited only by one old woman and her daughter whose husband had the ill luck to drift over the Falls in a canoe about ten years ago. Her log house stands at the back of the Island, looking toward the American shore,—a retired spot, but extremely pleasant in spring, summer and autumn, but a dreary solitude in winter, being cut off from any communication with the mainland by reason of the ice. This was a favourite resort for all those fond of fishing and shooting, it being a famous place for whitefish, pickerel and maskinonge, as well as wild duck and teal, thousands of which in spring and fall frequent the spot, by reason of the sheltered swamps at the extremity of the Island. Here I have spent many pleasant hours, little dreaming that it would afterward become so renowned in history for one of the most singular events that ever happened. On this account I have been the more particular in my description of it, but you must wait awhile, having many other circumstances to communicate before I paddle you over in a canoe to that curious spot.

On hearing the intelligence from Toronto, the farmers and settlers around the country imagined that events were far worse than they turned out afterward. But such is the natural bias of mankind to mystify, that the imagination was most powerfully wrought upon. Every breeze that blew indicated that a lurking traitor was at hand, either to set fire to a house, or blow your brains out. It therefore became every man's business to look out, not only for himself, but for the welfare of his neighbours. Our neighbour, Mr. Dobie, an intelligent farmer, Captain Ussher and ourselves were the only efficient hands in this retired spot, to mount guard and patrol the shore. The weather was extremely cold, and the frontier being bleak and dreary, particularly at night, rendered the service to be performed no sinecure. Our armory consisted of a brace of pistols, a rifle, a double-barrelled gun, and a single, with plenty of balls and ammunition. So that in case of an attack, the enemy would have found a warm reception, particularly as Harry, the black servant had heard, that in the event of the rebels succeeding, he would be immediately sent out of the country and sold in slavery again. We had frequent visitors from Chippawa and Fort Erie, so that in the day time we were never

dull, and one great source of amusement we had was conversation relative to wars in former times, both civil and uncivil, a topic we had not breached for a considerable time. As night approached the wind must evidently have whistled louder than usual, from the number of times we went to the door and paced the room, indicative at any rate of squally times. I made up my mind at the outset to take the affair very coolly, not believing it possible, as I observed to you before, that there could be many disaffected throughout the country generally; though I was well aware that Chippawa itself, only two miles distant, was so disloyal a place that, like the city formerly for which Abraham interceded, scarce ten men could be found in it who were true to the existing Government. This I imagined arose from its proximity to the States and intercourse with the Buffalonians. A contiguity therefore to so radical a neighbourhood might make us the more watchful, which indeed we were, not taking off our clothes for many nights together. Every hour did we pace up and down the river's bank, but heard nothing for the first few nights save now and then the hooting of an owl or the whistling of loons from their quarters in a creek on Grand Island. The dogs also partook of the general unsettlement, apparently conscious that some dire event was stirring, for they would go away for days together and at a time when they were most wanted at home. When any derangement takes place in the common order of events, such trifles weigh but little in the general scale; altho' the Romans paid as much attention to the cackling of geese as that of an army, their movements being frequently regulated by these simple omens.

Captain Ussher, an active officer, brother to the one at whose villa I was located, resided, as I informed you, on the adjoining farm. They were both men of undaunted courage, but being known to be thorough Tories like their father and the rest of the family, rendered their situation more likely to be marked by ill-designing men. The former was quickly on the alert to call out his company of militia. He had the greatest difficulty in collecting them together, partly from the circumstance of many being from home to reconnoitre the aspect of affairs, and others who being tinged with Mackenzieism waited in the back ground to join the strongest side. This circumstance would have weighed but little even on the present occasion, as the rebellion, as far as Mackenzie and his adherents were concerned, was crushed at the outset throughout the country, but his having escaped to Buffalo ultimately altered the face of things *in toto*. It produced a reaction in our internal movements that disturbed the whole Province from one end to the other.

Whilst his operations were concocting there, we were all quiescent, with the exception of keeping guard, listening from time to time to the silly and ridiculous reports that mischievous individuals invented to frighten old women, and those among the men who were half inclined to radicalism, but ashamed to own it. Men who halt between two opinions are seldom at ease in their minds, and this was the characteristic of the Chippawayans. It nevertheless had a bad effect. All business was suspended, and the people's time was therefore principally spent in rummaging up old guns, pistols, fire-arms of every description, and cleaning them up for action on either side as circumstances might require. Never was so sudden a transition from peace to war, a subject that superseded every other topic and was well exemplified by a song sung at our quarters by Mr. Watkins, formerly in the Navy,—“Twas in the merry month of May.”

When it was ascertained that Mackenzie had arrived at Buffalo, great curiosity was excited to find out his movements. Numbers crossed the River to see him, and to ascertain what plans he would adopt for the future. This was soon elicited, for in a few days after he had rested from his fatigue and the fright that generally attends cowardly minds, he divulged his operations to Dr. Chapin at whose house he had sought an asylum. That gentleman protected him from the insults of those who had, like himself, run away for their lives, disgusted with his movements. Others on the contrary, from a spirit of revenge at the reflection of having their property confiscated, still clung to his standard, hailing him as the Jack Cade of Upper Canada, thirsting still to carry fire and sword amongst his enemies. Their numbers, however, were few and principally confined to men of low origin and desperate habits, suited at all times for buccaneering expeditions, whereby they thought they could not only enrich themselves, but harass the Government. As soon as it was found that public curiosity was excited in Buffalo and its vicinity, it was publicly announced that Mackenzie would hold a meeting and explain his views. This plan of publicity doubtless originated with himself, who had assurance enough for anything, and (was) sanctioned by a set of broken down characters who had eluded both law and justice by absconding from their creditors. Consequently, having no character like their chief juggler behind the curtain to lose, they lent a ready ear to any scheme, however absurd, that might be broached on the occasion. The season of the year was also auspicious, for inland navigation had long since closed, and most of the steamboats laid up for the winter, leaving hundreds of boatmen, canallers, sailors, firestokers and workmen of various grades out of employ, whose time hung heavy on their hands. These worthies having no other amusement but playing bowls, sitting in groceries and low taverns, smoking, tossing, gambling and drinking, were on the *qui vive* for any encounter, however hazardous. Amidst such a medley, it will readily be imagined that a pretty large meeting might be collected together, which was in reality the case. From 1500 to 2000 is a fair estimate of those who congregated and whom Mackenzie addressed as gentlemen and intelligent fellow mortals. I saw a shrewd Scotch engineer the following day who, being gifted with a very retentive memory, gave me nearly verbatim the sum and substance of his oration. This I took down in writing; (it) was read over, signed by the individual, witnessed by Captain Barle, formerly of Brussels, and myself, sent off by express to headquarters with recommendations to keep a sharp lookout as mischief was evidently brewing.

The tenor of this discourse was, as you may imagine, to create in the minds of his hearers sympathy for his alleged misfortunes in not having succeeded in his plans. All his assertions were distorted, but being wrapt up in the cloak of probability struck the gaping audience with astonishment, and so wrought upon them that men, who went there merely as idle spectators, came away ready at a minute's warning to grasp a rifle and shoot the first Canadian Tory that came in their way. This, I say, was the issue, and, to give the Devil his due, he played his cards on that occasion, well suited to his restless, ambitious views. He told the pretended sons of liberty that the hour was come when it became the duty of all within the audience of his voice and elsewhere to come forward manfully in aid of so glorious a cause, to render Canada as independent as themselves; that nine-tenths of the inhabitants were

groaning with oppression and sighing for that happy state of independence which they enjoyed: that the scheme was still practicable, altho' he unluckily did not succeed in consequence of a mistake in the day named for their general rising. He also stated that for ten years he had devoted his time, his talent and his purse to consummate this glorious event, and that he was still as much devoted to the cause as at any period of his life; that there never was a finer opportunity than the present, when the resources of the country were so weak, having no troops within the Province or any means of defence; and that those who called themselves loyal were merely a few hirelings who were paid by the Government. As to England sending out troops, it was folly for a moment to entertain the thought, as they were all wanted at home to keep down the Irish, who were on the eve of rebellion likewise. There was an abundance of fine land in the country, and those who chose to join the standard would be rewarded with 300 acres each as soon as the expedition was accomplished. At this liberal offer every eye glistened. "'Tis true, gentlemen," said he, "we shall want blankets at this inclement season of the year, some other clothing, some arms and a good supply of ammunition, but above all, on the hazard of the die, some of the ready rhind called specie. Nothing," he observed, "could be accomplished without this. It was the sovereign panacea." Many stared at this assertion, as a poser: but considered they could get along tolerably well with plunder. In fact, he summoned recruits from a nation with whom we had been for years on terms of peace and friendship, to form a regular buccaneering expedition, as it afterward commenced. He read a number of confidential letters that he had plundered from the mails, the contents of which he thought would tickle the ears of his audience, and wound up his harangue by assuring them that the long disputed Boundary Question would then be settled.⁶⁴ This was considered a prodigious feat, and drew forth bursts of applause, after which he took his departure with Doctor Chapin, under escort of twelve armed men, so alarmed, even then, was he of his personal safety, fearing he might be assassinated before he could carry his plans into effect, so as to share in the universal plunder and take up his residence at Burlington Castle, near Hamilton, the spot he had fixed upon for his councils. I think I see you smile, and well you may. Howbeit, the intellient audience separated, many of them a full inch higher, with their consequence, in anticipation of reaping this golden harvest, 300 acres of the fertile soil of Canada. Their dreams were like those of Abdallah, on this all-absorbing conquest, but which unhappily the beams of the morning dispelled. Others on the contrary began to think that a bird in the hand was worth two in the bush, and therefore lost no time in disposing of their rights at the best market they could find. Strange as the infatuation may appear, I have been credibly informed that considerable speculation was entered into, not only in the land department but "patriotic scrip," which was paid away for provisions and clothing. This was to become payable when all rogues and plunderers became honest men. I need scarcely remind you that a heavy discount soon ensued, as the grand desideratum was never accomplished, consequently the coffers of the deluded victims were ultimately minus to the amount of the outgoings. Patriotism, however, was the order of the day for a long time. They wore a strip of white ribbon round the arm, as an emblem

⁶⁴ This account of Mackenzie's address in Buffalo is the most complete available; it is only briefly mentioned in Lindsey, Vol. II, p. 125. (H.)

of the purity of their intentions, and ate more pork and molasses at the public expense than had been consumed for many winters.

Whatever novel scheme is offered to delude weak-minded people, there are sure to be numbers found silly enough to enlist in the cause, no matter whether religion or politics. Recall to mind the Crusades to the Holy Land, when thousands perished with hunger and the sword; also the scheme of Dick Brothers⁵⁵ to rebuild the walls of Jerusalem, who had a vast army enlisted in the cause, altho' the king of France absolutely refused to furnish his quota of ten thousand wheelbarrows. Nevertheless the subject is not entirely forgotten, for within a few years the spot fixed upon for the New Jerusalem was Grand Island, within sight of us here, a survey of which was actually made for carrying the project into execution. A sawmill is now in operation there which can furnish a good supply of lumber when the scheme is complete.

Such chimeras have their day and will continue to do so as long as people are found silly enough to countenance Owen's visionary scheme for Harmony Settlements,⁵⁶ or Mackenzie sly enough to dupe a nation proverbially cautious in what is commonly termed—being taken in. Perhaps among the recorded events of history there never was so audacious a piece of effrontery as at present. Yet I shall hereafter shew you that not only were the half-starved enrolled in the patriotic cause, but men of substance and fortune actually found weak enough to contribute hundreds and thousands of dollars to carry this visionary scheme into operation. So true it is, as Pope justly observes, that amidst the human family there are found men of various grades ever grasping at phantoms never within their reach. Such men are only to be pitied for their folly,—and even this is thrown away upon them, as they view even realities with a jaundiced eye—

"You think this cruel? Take it for a rule,
No creature smarts so little as a fool."

⁵⁵Richard Brothers, an extraordinary enthusiast, was born, December, 1757, at Placentia, Newfoundland; partly educated at Woolwich, he entered the Royal Navy as midshipman in 1771 and saw some active service. He became Lieutenant in 1783, and was discharged on half-pay in the same year, which he continued to draw until 1789, when he ceased further to draw it as he refused to take the oath required. He gradually grew into the belief that he had a divine mission, that he was the Prince of the Jews, a descendant of David, and the nephew of God. In 1794 he published a book of interpretation of prophecy, "A Revealed Knowledge of the Prophecies and Times" (My copy is a Philadelphia reprint of 1795). He was suspected of treasonable practices, but after examination by the Privy Council he was committed as a criminal lunatic, thus antedating Robert Gourlay by a quarter of a century. He had many followers, some of them of great intelligence and high station.

After a very singular and interesting life he died in 1824. He was perhaps the first advocate of Anglo-Israelism, at least in our language.

Several of the works of Brothers and his followers are in the Riddell Canadian Library, Osgoode Hall.

⁵⁶Robert Owen, born at Newtown, Montgomeryshire, 1771, who after a successful career as cotton-mill proprietor, adopted a crude and heterodox political economy; he bought from the "Rappites," the colony of Harmony on the Wabash River, and established a new colony on his own principles as "New Harmony," Indiana. He took an active part in the Co-operative movement in Britain, and was the leading Socialist for many years before his death in 1858. His son, Robert Dale Owen, is better known than Owen himself, but Owen was a self-sacrificing, devoted servant of humanity; his theories were not successful, but his life deserved the "Well done" of the Great Master.

But to proceed. A committee was formed to frame the outline of a new Constitution, which was to be carried into effect as soon as a sufficient force was collected to take possession of the land of promise. In the meantime, they framed what is termed a provisional government, of which Mackenzie was constituted chairman, but not cashier. This was managed by a committee; nevertheless he contrived to get his share of the booty so generously bestowed by the Buffalonian sympathizers.

The result of the subscription entered into furnished a variety of supplies for the new recruited Jack Cade brigands, who sadly wanted blankets to keep out the cutting blast of a northwest wind which blew keenly on this memorable occasion. Those who had no promises to pay, commonly called dollar notes, contributed something to the common stock in the shape of barrelled pork, flour, molasses, tobacco, potatoes and whiskey, it being considered stingy not to shew patriotism by a small contribution into the general treasury.

Those who enlisted belonging to the temperance society drank water, the only store that ultimately never became exhausted. Another class, by far the most numerous, took their bitters in the morning and drank whiskey or brandy when they could get it. But the officers, who were appointed to marshal the ranks, being men of energy and strong minds, fared sumptuously on fowls, turkeys and venison; drank wine with their almonds and raisins after dinner, and now and then a glass of champagne to elevate their spirits afterwards, so liberally did some of the merchants come forward in aid of the cause. This sketch may appear to you exaggerated, but is a positive fact and a remarkable one too in the annals of excitement, showing how delusion may carry men beyond the limits of prudence and common sense.

Business, however, was to be entered upon, the main point of which consisted in arms and ammunition. Altho' many were willing to feed the hungry and clothe the naked, yet the same individuals clung most tenaciously to their rifles, preferring the use of these weapons themselves rather than their acting by proxy. No resource was therefore left but going to the fountain head, the Government, whom the brigands conceived better able to provide so necessary a portion of their outfit than private individuals. Accordingly the arsenals were promptly thought of, it being considered superfluous to keep a quantity of muskets idle and liable to corrode at a period when there could be no earthly use for them in a time of profound peace. A few loose cannon, too, might with safety be abstracted, more especially as the people had absolutely paid for them. Therefore no great harm could accrue by the people also having a share in the use, it being philosophically argued that it was a joint stock concern. This is the great advantage of free institutions. Preparations being completed, the command of these ragamuffins, amounting to no more than 300 men, at the first devolved upon an individual of the name of Van Ranselaer,⁵⁷ son of the postmaster of Albany. A man of aspiring notions, who firmly believed the Canadians could be as easily subdued as the Spaniards in South America, he panted with ambition to become a

⁵⁷ Ranselaer Van Ranselaer was the son of the General Van Ranselaer who commanded the American troops at the Battle of Queenston Heights in 1812; the son had no merits but a fine manner suitable to his name and descent: he was a braggart, braggart with little military knowledge and less common sense, and showed a proper contempt for his Canadian associates and subordinates.

second Bolivar. Gifted with idle, extravagant habits, which his father prudently would not indulge him in to his own ruin, he thought this a fine opportunity to repair his shattered finances, which ultimately plunged him in jail to meditate on his follies. He was appointed General, or General as Major Downing calls it, on full pay—a title with us in England betokening a man of some rank. Not so, however, on the other side, there being more generals there than men to command. It has, however, one advantage, that those who want common sense involuntarily feel elevated by it. This preliminary fixed, the drums beat and the wry-necked fifer became nearly broken-winded with his exertions to induce the bystanders to enlist in the glorious cause; but it was of no avail with the calculating ones, although the tempting offer of 300 acres of land stared them full in the face. Many were more than half inclined to join the standard, especially when they saw the flag, worked by the pretty Buffalonian ladies, so remarkably handsome, but on second thought they cautiously kept aloof just to see how the game would commence, and what chance there would be of any opposition, an event apparently never contemplated by the ringleaders.

In a movement of so much consequence it was thought advisable to get along by degrees, and to keep on the safe side as long as they possibly could. Accordingly, the advance guard reached an old Indian settlement called Tonawonta, half way between Buffalo and the Falls, and opposite to the heart of Grand Island. Here they made a halt. All was safety so far as the enemy was concerned, but at home they had to look out for their own government officers, having violated the laws by pilfering the cannon and muskets, to say nothing of food and clothing which they occasionally picked up on the way. You may be sure that, between two fires, they did not halt long. Accordingly on the following morning, they ferried over to Grand Island amounting in numbers to 220 men, a wonderful force truly to take possession of Upper Canada. But nothing is accomplished without confidence. The Tonawonta natives gladly supplied them with boats to get rid of so desperate a crew from their quiet village, and even supplied them with salt for their porridge. The rear rank, consisting of the commissariat department and about 100 others, were still behind in charge of the eatables and drinkables. These soon followed, forming altogether as rough a picnic expedition as was ever beheld.

I believe I told you that Grand Island belongs to our neighbours. Therefore, to secure themselves from molestation, they agreed to make the conquest of Navy Island belonging to the British Government, and inhabited only by one old woman and her daughter, whom they sent over to Grand Island in snug quarters there at a log hut within sight of their previous location. This was wanted for the head officers of the New Convention,—a dwelling compared with which, Jack Straw's castle on Hampstead Heath is a palace. Having safely landed with a couple of six pounders, they commenced operations for fortifying themselves, being determined to act on the defensive until a further reinforcement arrived from Kentucky and elsewhere. They imagined that the novelty of the expedition would spread like wildfire, and that thousands would join them in their winter quarters preparatory to opening the spring campaign.

That no opposition should be made to their landing, they kept the place of their destination a profound secret, and marched through a wild forest

for four or five miles, frequented by nothing whatever but deer and wildcats. It so happened, however, that early intelligence reached us, and had it been acted upon promptly, the whole trouble, confusion, expense and inconvenience might have been easily avoided. It was early in the morning of the 11th of December, I was at Captain Ussher's, when a respectable farmer called to give his deposition relative to their movements. He stated he wished to do so from a fear that his cattle and property would be plundered by these brigands on their march. He owned a large farm on Grand Island, as well as three hundred acres of land in Upper Canada, and therefore claimed our protection by dispersing the pirates as quickly as possible. He happened to be at Tonawanta at the very time when they embarked. Suspecting their place of destination, which on enquiry was confirmed, he hastened through the Island to the shore, took his canoe, came over and gave us the information. This was the first intelligence that reached us. We took down his deposition in writing, witnessed it, and after breakfast Captain Ussher mounted one of his horses and rode off to the commanding officer,⁵⁸ then at Fort Erie, to give him intelligence. It was considered an event so highly improbable that no further notice was taken of it further than passing the communication on to another quarter. We were displeased, being firmly convinced that the farmer's testimony was implicitly to be relied on, but having no authority to act, nothing could be done, although Mr. Ussher volunteered for one to go over and keep guard. There were also numbers in readiness to join him. The remainder of the day we kept a sharp lookout, allowing no boats to pass without permission of a magistrate, yet notwithstanding our vigilance some spies had been known to cross higher up the river. One of these, however, corroborated the farmer's testimony by mentioning the circumstance at a small tavern about half a mile distant, where I called every hour to ascertain if there were any suspicious characters. At four o'clock in the morning we went down to Chippawa and stated this fact also, but the Colonel was as little inclined to belief as the other; he promised, however, that a conference should be held in the course of the day, which was accordingly done, but the golden opportunity was lost by reason of the time that elapsed in passing, repassing and conferring together. A handful of men at that crisis would have prevented the direful disasters that afterward occurred. I wished for the spirit of Lord Peterborough's movements at that juncture to act promptly, in order to prevent the annoyance which must inevitably arise from those marauders taking quiet possession of an Island from which, if they intrenched themselves well, they could with difficulty be removed. The militia are all very well as secondaries, but from the circumstance of being so little engaged in warlike operations, they make but poor primaries in a case of emergency of this kind. This does not arise from any defect in personal courage, because the late events have proved this fact to the contrary. It arises from a want of organized plans and extension of service, to teach them the importance of every position and advantage to be taken of the movements of an enemy, which can only be acquired by tact and experience.

I nevertheless agree with my friends that common foresight and prudence should have induced the Colonel of the District, in the absence of any regu-

⁵⁸ Probably Colonel Kenneth Cameron, formerly of the 79th Highlanders, and at that time Assistant Adjutant-General.

lars, to send over a guard to the Island, knowing as he must have done that Mackenzie was in Buffalo inflaming the minds of the people to revolt against us.

From ocular demonstration, it was proved on the following day⁵⁵ that our information was correct, for we could plainly see the pirates walking around the Island and preparing their fortifications. All night long the axe was heard, felling trees for breastwork and the construction of shanties as temporary huts to shelter them from the cold until they could convey lumber over for building, which was soon effected, necessity being with them the rallying point to raise quarters as speedily as possible, not only for themselves but for the anticipated Kentucky boys. We could see them cutting down and carrying away fern and brushwood for beds to repose on. They kept up large fires, most of them being apparently accustomed to night campaigning in the open air.

Dreary as our midnight patrolling was, before the arrival of the *General* and his advanced guard, you may readily suppose we were no better off after the arrival of our piratical neighbours, whose plans we were totally ignorant of. They might come over in boats, burn the houses and pillage the country, then return with the greatest alacrity without being caught, for we had, as I before stated, no other guard along the frontier. Fortunately, however, they were too closely engaged in their military tactics and shanty building to trouble us, although the circumstance of their being armed and not knowing precisely their numbers was a source of great alarm all round the country.

The very taking possession of our soil, small as the Island is, aroused the indignation of the loyalists, and prompted them to greater exertion than they had hitherto manifested. The news which had gone forward to Toronto as doubtful was no sooner confirmed, than volunteers marched from all quarters, and despatches were forwarded to the Lower Province to recall all the regulars they could spare. Order being partially restored in that quarter since the destruction of Saint Charles, and the flight of the prominent leaders, the troops promptly obeyed the call and prepared for departure.

In common seasons their transportation by water would have been impracticable, such an occurrence being rarely remembered of steamboats plying toward the end of December. This season, however, as if aided by a superintending power in favour of our cause, was mild, enabling the boats to run without interruption from the ice. Detachments of the 24th and 32nd regiments quickly arrived at Toronto, from whence they rapidly pushed on without the harass and fatigue of travelling by land. Whilst these brave fellows were on their route, volunteers from various districts had arrived from as far north as Port Hope, Cobourg, Prescott and other settlements along the lake shore. Colonel MacNab⁶⁰ also had returned from the west and pushed on with three hundred men, joined by Captain Kerr and his two hundred Indians who had painted their faces red, a custom among them on warlike expeditions. We were not a little pleased at their arrival, having some chance of being relieved on our midnight guard.

⁵⁵ Possession was taken by the "Patriots" of Navy Island, December 13th, 1837.

⁶⁰ Colonel (afterwards Sir) Allan Napier MacNab arrived at Chippawa, December 20th. His name is found spelled in many ways—McNab, McNabb, M'Nab, M'Nabb, Maenab, Maenabb. He was placed in command on this frontier and was afterwards knighted for his services.

The quiet village of Chippawa suddenly assumed quite an animated appearance from the influx of so many strangers. So rapid had been the movements of the troops that in a very short time upward of four thousand had arrived to our protection. Bands of music, bugles, marching, counter-marching, drilling, firing, cannon exercising, the bustle and stir of the commissariat department, waggon loads of bread, beef, pork and potatoes moving along the road from the surrounding farms, presented a spectacle quite novel to me, who for the first time was located in the very heart of the contending parties. Private houses were all turned into barracks and the Methodist Chapel into a hospital. Our worthy clergyman turned the sword of the Spirit into an instrument of war, nothing in fine being thought of but preparations for defence in the event of an invasion. This all-engrossing topic superseded every other consideration.

I should tell you that, in conformity with the Colonel's assurance, preparations were made for going over to the Island, to make remonstrance against American citizens taking possession of our territory.⁶¹ Accordingly, some of the magistrates, accompanied by volunteer rowers, proceeded on their way thither. This was an ill-judged experiment,⁶² as they must have been aware that the brigands were too numerous, and too well armed, to allow them to land, although it was their policy to have done so, which would have secured the party prisoners, and secured the boat. Willing, however, to show us that they, in reality, had commenced their fortifications, and possessed cannon, so soon as the boat neared the northern extremity of the Island, they opened their battery and fired a six-pounder upon the adventurers. This was too warm a reception, so they deemed it most prudent to return, which they quickly did, without accomplishing the end in view. Two or three more shots were fired, but without effect, their artillerymen not being in sufficient practice to level a good aim, or make that allowance in the art of gunnery with a moving object, so as to do any injury.

So incredulous were the authorities in power as to their numerical force, considering that merely a few lawless fellows had gone there on a freak, that they determined on another experiment, which took place shortly after, and would doubtless have succeeded had they manned a sufficient number of boats. Unluckily, however, as I hinted at the outset, we had no boats of any consequence, but they were very quickly supplied from Queenston and elsewhere. The sleighing being good, a grand movement took place, and it was really curious to see the rapid arrival of so many boats. In a few days near one hundred were collected together. I saw one immense boat that would hold fifty men, drawn all the way from Hamilton, a distance of forty-four miles.

⁶¹ Lieutenant-Governor Sir Francis Bond Head, as early as December 14th, 1847, had sent a remonstrance to Governor Mayoy, of the State of New York, concerning the agitation at Buffalo to procure countenance and support for the disaffected in Upper Canada. Head, 332, Leg. Ass. 97; the Governor, December 19, issued a Proclamation against attempts to set on foot military expeditions or enterprises in violation of the laws of the land and the relations of amity between the United States and the United Kingdom, Leg. Ass. 98: this was almost a dead letter, and practically nothing was done for weeks to check the movement. On Navy Island being occupied, Head, December 23, sent Archibald McLean, Speaker of the House, to Washington with a full account for the British Ambassador, Henry S. Fox, Head 335; Leg. Ass. 98.

⁶² I have not seen this "experiment" of the Magistrates noted by any other writer.

by thirty-six oars: a sight I shall, in all probability, never witness again. Schooners also were ordered from the shores of Lake Erie, and every other kind of craft that the country possessed. The two first boats were soon brought into service without waiting for a general attack, which, at one time, was determined on. These were manned by a reconnoitring party,⁶³ consisting of intrepid young fellows who had freely volunteered their services. The current being strong, they were towed up the river a little beyond Mr. Ussher's. The party, consisting of six in one boat and eight in the other, proceeded toward the Island, intending to row down the stream between Navy and Grand Islands. The object in view was to ascertain what force was stationed at the back part, where the old lady's cottage stood, then taken possession of by Van Ranselaer and Mackenzie, with their aide-de-camps. No sooner, however, had they reached the line opposite the extremity of the Island, than a brisk cannonading, with six-pounders, opened upon them. It was an interesting and novel sight, though an alarming one, lest our brave countrymen should be swamped by a cannon ball. At the first fire we distinctly saw where the ball struck the water, well directed as to the line, but too much elevated, so that the ball passed over their heads and struck some distance off. The second shot was better directed and fell very near the bow of the boat. Finding it would be impracticable to get round, they rowed back and returned to Chippawa, about midway in the current on this side, but sufficiently near to the Island for any experienced riflemen to have done great execution. By this time a vast number had assembled with their rifles, who kept up one incessant firing, but all to no effect. I should think, at the least, there were two hundred balls fired, still no harm done, which satisfied us there was less to fear from the brigands than had by many been anticipated, although it had been given out that their aim was as unerring as the Indians'. Whilst the boats kept gliding along, our fine fellows only laughed at them, twirling at the same time a hat on the end of a boarding sword, with which they were all well armed, as well as pistols. Before they cleared the Island, another cannonading commenced, with similar ill-success. The ruffians discharged seven six-pounders, but none near enough to either boat even to splash them. One ball, I noticed, dropped in the water midway between the two boats. This was the second best shot that was made. On reaching Chippawa they gave three cheers, and landed amid the applause of the bystanders. After Mr. Ussher had played "God Save the Queen" on his bugle,

⁶³ Richard Arnold's account is as follows (Dent, Vol. II, p. 215):

"The next day (*i.e.*, December 26, 1837) I and several other volunteers accompanied Captain Drew on a reconnoitring expedition. We set out from Chippawa Creek in a small boat and proceeded to circumnavigate Navy Island, where we could see the rebels in full force. As we approached the island they fired round after round at us, and the bullets whistled thick and fast over our heads. Our position was one of extreme peril. 'What a fool I am!' exclaimed Captain Drew, 'to be here without a pick-up boat. Should we be disabled we shall find ourselves in a tight place.' One of the rowers in our boat was completely overcome by fear, and finked. 'I can't help it, boys,' said he—and threw himself at full length along the bottom of the boat. We made the trip, however, without any accident. The next day we made another expedition in a large twelve-oared gig, with a picked crew, chiefly composed of lake sailors. Again the shots whistled over our heads, and struck the water on both sides of us, but in the course of a few hours we found ourselves back again in Chippawa Creek without having sustained any injury. We had by this time become used to being under fire, and didn't seem to mind the sound of the whistling bullets."

we walked down to see the results. I examined the boats carefully, but no symptoms of a single bullet mark out of the two hundred fired on the occasion, convincing us that the recruits must be better practised in the art of gunnery before they attempted to cross over and pay us a visit.

These reconnoitring parties ceased soon afterwards, and a Council of War was held as to the best course to pursue to dislodge the marauders. It was desirable, if possible, to spare the effusion of human blood, and on this account it was considered advisable to act on the defensive, particularly as our reinforcements were numerous, and detachments arriving daily from distant districts. The Jewish Monarch declared formerly that in the multitude of councillors there is safety. Unfortunately, however, from there being too many, the court was harassed much longer with apprehensions of alarm than was consistent with the general character of the British nation. This indecision was afterward a source of reproach by the American authorities, who considered that it was our duty to remove a lawless band who had taken possession of our soil contrary to the existing treaty between the two countries. Colonel MacNab was of opinion that the first shedding of blood by forcibly removing them would weigh but trifling in the scale of contention and prevent numbers afterward falling a sacrifice by the sword, an idea which was looked upon by the most intelligent men as a moral certainty. Indeed, it was on the eve of being accomplished, but afterward countermanded. A plan of the Island was drawn by my friend Captain Ussher and myself, where every spit was marked, so intimately acquainted were we with its location, from having gone over so frequently on shooting expeditions. This was forwarded to the Governor, preparatory to his taking a circuit along the frontier.

Whilst the subject of attack was under consideration, various magistrates assembled at Fort Erie in council, who drew up a remonstrance, signed by Mr. Merritt, chairman, requesting the Mayor and authorities at Buffalo to inform them whether the aggressions complained of were noticed by them, or in any way sanctioned, or whether in reality any preparations were making for hostilities—an event wherein there appeared some probability, from the circumstance of drummers parading the streets of Buffalo on recruiting service.

Dr. Trowbridge, the Mayor, an intelligent and highly reputable man, finding the enthusiasm of the people had gone beyond the power of the law to restrain their proceedings, resigned his situation in favour of Mr. Barker. Previous to this, however, he wrote a reply to the magistrates assembled at Fort Erie, assuring them that everything practicable would be done to restore order, and that, so far from the Government wishing to sanction the proceedings of the rabble, every precaution would be taken to allay the excitement.

Doubtless many speculative men were at work behind the scenes with a view of aggrandizement in the event of the marauders succeeding. But the most influential and respectable classes used their utmost endeavours to put the law in force and prevent a violation of neutrality. They issued the following proclamation and held a meeting which resulted in ordering Macenzie and his gang to quit the city within six hours, which they accordingly did, and made the best of their way to Navy Island as a place of security:

Address to the Citizens of Erie County from the Mayor and 140 of the leading men of Buffalo.

The undersigned inhabitants of Buffalo and Black Rock, have witnessed for a few days past, with deep regret and mortification, large bodies of men thronging our streets and public houses employed in enlisting volunteers, collecting arms and other munitions of war, and organizing themselves into military corps for the open and undisguised purpose of crossing into Canada to aid with their arms in the civil contest now waging between a portion of the people and the government of that province.

However much we may sympathize with our neighbours of Canada, or desire to see them emancipated from foreign domination, we should recollect that we live under laws of our own making, which it is not less our pride than our duty to obey and enforce, and in the strict execution of which, consists our real liberty and the superiority of our political institutions.

Many of our citizens, judging doubtless by the unrestrained freedom with which we are permitted to canvass and express our opinions of other governments, are not aware of the fact that the arming of men or fitting out military expeditions to act against a country with which we are on terms of amity, is forbidden, as well by our own municipal laws, as by the law of nations, and subjects the offenders to severe penalties.

The object of this notice is to apprise those who are acting under such delusion, that they are violating the laws of their country, and to beseech them to abandon at once an enterprise which, while it exposes them to punishment, promises but little advantage to those whose cause they wish to serve.

Should this advice be disregarded, we call upon the Civil Officers of the City and County to interfere and put a stop to these illegal proceedings, and we severally pledge our personal aid in causing the laws to be executed.

Buffalo, December 14, 1837.

Had these resolutions been promptly followed up by the marshal and others in authority, quiet would soon have been restored and the rebellious faction disbanded. But a strong party of speculators arose in their favour and winked at their proceedings, allowing boats to convey arms, ammunitions and provisions to them, which might easily have been prevented. Certain authorities even saw cannon with the United States mark upon them, and yet took no measures to secure them or to detain the parties who were known to be the pilferers. A steamboat⁶⁴ was also hired for the conveyance of recruits, arms, ammunition, etc., to the Island, which had arrived from Rochester and other districts in sleighs, where the jurisdiction of the marshal extended. A guard also, in time of peace, being allowed to watch the boat at night, without any warning that it was an infringement of neutrality, was truly unaccountable. Strange as this conduct may appear to you, I have it from the best information—gentlemen who were over there when the marshal conversed with Van Ranselaer and who saw a cannon in his boat belonging to the American Government. Conduct so reprehensible could not escape

⁶⁴ This was the *Caroline*, a steamboat about 75 feet long and of 46 tons burden, the property of William Wells, of Buffalo, which was cut out of her berth in the ice at Buffalo and brought down to Schlosser, December 28th, plying across to Navy Island.

the censure of our authorities, who, finding that so much distress and apathy prevailed, considered it high time to look out for themselves, having previously ascertained that the American militia refused to act.

All these circumstances being taken into consideration, a Council of War, which was held at Chippawa, determined upon some vigorous measures to prevent further aggressions upon our territory, and to open the eyes of the deluded Buffalonians as to the impolitic course they were pursuing. They would have rejoiced had the authorities on the other side done their duty by putting a stop to innovations so hourly notorious. After allowing the American authorities a fortnight, and finding all their remonstrances unavailing, they determined to act decisively and to perform that service which it was the bounden duty of the American Government to have done themselves. No alternative remaining,⁶⁶ six boats were manned under the command of an intrepid officer, Captain Drew, with instructions from Colonel MacNab to proceed at night and take possession of the piratical steamboat, the *Caroline*, which was known to be illegally conveying cannon, arms, ammunition, recruits and provisions over to the marauders and rebels on Navy Island. She was seen plying on the afternoon of the 28th,⁶⁶ and not returning, it was supposed she would moor there for the night. In whichever case, however, they were to take possession of her at all hazards. Accordingly, about ten o'clock at night, the preparations were completed and the boats manned and well armed for the expedition. A more hardy or intrepid set of fellows could nowhere be found, all in good spirits, and ready to achieve any event however hazardous. On nearing the Island, they found that the said steamer had left in the evening for Schlosser on the American shore, thinking to be protected, and beyond our control, but the result proved the contrary. The first two boats kept ahead of the rest, having more experienced rowers, and, on arriving alongside, were hailed by the sentry for the counter-sign. No satisfactory answer being given, the party on guard fired, but without effect; the boat was soon boarded and taken possession of, but not without the loss of several lives in the confusion that ensued. This is a brief outline of the proceeding, columns of which have been written on the subject containing more untruths than I need trouble you with. As the current was too strong toward the Rapids and Falls, to tow her over, which was the original intention, she was set fire to in three or four different places, un-

⁶⁶ Captain Drew, R.N., who was in command of the expedition, in his report, December 30th, says: "I directed five boats to be armed and manned with selective volunteers," Leg. Ass., 90. G. T. D. says: "Five boats were prepared, well manned, well armed and with muffled oars," Can. Monthly, Vol. III, p. 290. Richard Arnold says: "The expedition consisted, as far as I am reminded, of seven boats each containing seven men, i.e., four rowers and three sitters," Dent, Vol. II, p. 216. The number of boats is given as seven by most authors, and is probably correct. Sir Allan MacNab, under oath in the McLeod Trial, says "they were seven in number . . . seven or eight men in each boat . . . about forty persons," Trial, 124. "The boats did not all return at the same time. Five arrived at about the same time, two at a different time," Trial, 125. John Harris gave the same evidence, Trial, 129. "Seven boats left Chippawa, five only reached the *Caroline*, five returned in company." With this Edward Zealand agrees word for word, Trial, 135. Robert Armour says, "Seven started, five crossed the river," Trial, 147; so do Christopher Bier, Trial, 157, 159; Hamilton Robert O'Reilly, Trial, 162, 165; Sheppard McCormick, Trial, 169; Frederick Claverly, Trial, 170, 175, and several others. The fact seems to be that seven boats started, but two lost the way and did not cross the river.

⁶⁶ This should be "29th."

moored, and allowed to drift her course over the Falls, a species of navigation that was certain to consign her to oblivion forever. The night was very dark; consequently, as you may suppose, it was a very grand sight to see her gliding with the current towards the whirlpool of her destination, whither she in due time approached, and no vestige of her remains were ever seen afterward.⁶⁷

The boats quietly rowed back into the Chippawa, having two prisoners⁶⁸ and three of the party wounded, one of whom, Mr. McCormack,⁶⁹ suffered severely, and afterward received a pension for his bravery; the other two soon recovered. After eliciting all the information they could obtain from the prisoners, they were allowed to return home the following day, it appearing that they were strangers who had taken shelter there for the night, the small tavern at Schlosser being quite full. Many others similarly situated took to their heels as fast as they could on escaping from the vessel.

The American papers, as you may suppose, published the most exag-

⁶⁷ It seems quite certain that the *Caroline* did not go over the Canadian Falls, nor as a whole (at least) over the Falls at all. Her engines seem to have sunk and portions of her charred woodwork went down the river and over the Falls on the American side.

⁶⁸ Both British subjects: one was Sylvanus Fearnus Wrigley, of the Township of Dumfries, who had enlisted with Dr. Duncombe; after Duncombe's men were dispersed, he crossed the Niagara River to join the "Patriots." He was on his way to Navy Island where he was captured. He was detained in jail for three months and then discharged on giving bail for good behaviour. The other was Alfred Luce, a native of Lower Canada, who had also joined Dr. Duncombe; he shared in Wrigley's adventures until his capture. He was released the following day and sent across the ferry to the United States, as there seemed to be doubt whether he was not a citizen of that country. Dent, Vol. II, 213; Leg. Ass., 91.

⁶⁹ Lieutenant Shepherd McCormack (so named by Drew in his official Report, December 30, 1837, Leg. Ass., 90; but both names are spelt in different ways, e.g., the pensioning Statute, 1838, 1 Vic., c. 46, calls him Sheppard McCormick) was shot in several parts of his body and also received two cuts from a cutlass. He was permanently injured: he received a pension from Upper Canada of £100 (\$400) per annum, counting from December 29, 1837.

The Preamble of the Act is worth copying:

"Whereas Sheppard McCormick, Esquire, a retired Lieutenant in the Royal Navy, received several severe wounds in action at the capture and destruction of the Piratical steamer *Caroline* in an attempt to invade this Province by a lawless banditti, by which he is disabled, and it is just and right that he should receive a Pension during such period as he may be so disabled by said wounds."

He received the pension until his death, when it was continued to his widow.

It was the conventional thing for all loyal Canadians, from the Lieutenant-Governor down, to call the Canadian Rebels and their U. S. "Sympathizers," "*Pirates*"; they were "*Pirates*" to precisely the same extent and in the same way as William of Orange and his English and Dutch followers. "*Pirates*," however, offset "*Patriots*," with "apt alliteration's artful aid." "*Banditti*" ("we call them plain thieves in England") is another term of opprobrium equally well deserved; "*a Banditti*" is not quite without precedent in our literature; but then I recall a student of mine, *Consule Planco*, speaking of "the distance between one foci of an ellipse and the other." And Parliament is like Rex, *super grammaticam*.

The second reported wounded was Captain John Warren, formerly an officer in the 66th Regiment; his wounds were trifling and he resumed duty the following day. Dent, Vol. II, 212; Leg. Ass., 89, 90. The third was Richard Arnold (wrongly called John Arnold in the official Report, Leg. Ass., 90). His story is given in Dent, Vol. II, 214—he was "struck by a cutlass on the arm and got a pretty deep gash just above the elbow;" he was "invalided and sent home to Toronto in a sleigh next day;" there his "wound healed rapidly, leaving me none the worse." He died in Toronto, June 18, 1884; he always was properly proud of being the last man to leave the *Caroline*.

gerated statements, alleging that forty or fifty individuals were on board when the steamer was unmoored, who had no time to escape; but this, from the nature of things, was totally impracticable, as some time elapsed in setting fire to the vessel. She was also moored so tight with a chain that the party had considerable difficulty in unloosing her. During these preparations, therefore, ample time was afforded for any one to escape. I saw several of the gentlemen who went on the expedition, the following morning, but in the confusion that ensued and the darkness of the night, it was difficult to elicit the loss of the enemy. Mr. Chandler thought only one,⁷⁰ and three or four wounded; Lieut. Elmsley told me he believed five or six, which I believe to be the sum total of their loss. One only was actually found, who had acted in the capacity of sentry; he was interred in Buffalo amidst a large concourse of sympathizing spectators. But however many might deplore his fate, others considered he had voluntarily placed himself in danger, when he ought to have been industriously employed elsewhere.

You may be sure that so unlooked-for an event created no small sensation; it had, however, a most beneficial effect—that of stirring up the citizens to do their duty by endeavouring to preserve neutrality. Meetings were held; militia and volunteers were enrolled, and they then began to look after their own property instead of foolishly furnishing a gang of marauders with food, from whom they could not possibly derive any return or even thanks. Many, however, still thought differently, being violently excited and threatening vengeance. A more trifling circumstance than this, you may recollect, involved the Greeks and Romans in a ten years' war. But in the present instance it terminated in declamation and idle words, which were much cheaper than troops and gunpowder.

The rebels on the Island were also very indignant at losing so great an augmentation to their resources; they vented their spleen by opening a brisk cannonading the following morning on our houses opposite, as well as the military waggons and passengers who were passing and repassing along the frontier. This they had occasionally done for a week, without doing much damage. I am sorry, however, to inform you that three lives⁷¹ were unhappily lost. One individual, who had taken shelter in Mr. Ussher's barn, was so seriously wounded in the abdomen that he died soon afterwards; another had his legs shot off; the third, on undergoing amputation, sank with exhaustion.

The houses which contained companies of guards were battered severely; a ball went through the upper part of a room where twenty or thirty men were stationed. In the adjoining house, a tavern, two balls went through, which induced the parties to decamp. A red-hot ball fell near Captain Ussher, which was afterward preserved. In the house beyond, where I had been located for a month, a ball entered the front door through the parlour

⁷⁰ Captain Drew in his official report said, "I regret to add that five or six of the enemy were killed, Leg. Ass., 90; but it is reasonably certain that there was only one killed; this was Amos Durfee, of Buffalo, for the murder of whom Alexander McLeod was tried at Utica, N.Y., in 1841. There were several wounded more or less severely.

⁷¹ MacNab, writing to Lt.-Col. Strachan from Chippawa, January 19, 1838, says: "Three of our brave and loyal Militia have unfortunately lost their lives in the service of their country against the Rebels and their piratical allies upon Navy Island. They were all killed by gunshot wounds." Leg. Ass., 264.

and just took the corner of the dining table, forming a line on the surface as if ruled, went through Mrs. Ussher's bedroom and did considerable damage. Six others passed the house in different places, which ultimately rendered it untenable. It was high time, therefore, to shift apartments below stairs into a kitchen, which was built behind an embankment; here we were safe, but it was beyond a joke the whizzing of the balls, which at times came very near us. You would have imagined that the people here were disciples of Charles the 12th of Sweden, had you seen the number of people congregated on the frontier, not only in waggons looking over to the Island, but on foot. They were even imprudent enough to stand in groups as a mark for the rebels to fire at. I was one morning walking with Mr. Meredith and Dr. Hamilton in front of Mr. Ussher's house, when a warm firing commenced. A ball passed behind us within sixty yards and tore up the ground; the whizzing noise induced us to put our hands to our ears, and I for one involuntarily lowered my head, upon which Dr. Hamilton coolly replied, it was better to walk on quietly upright: he, however, was used to such matters in the last war. Strange as it may appear, I believe now that it is possible even to be fond of the excitement, for Mr. Merritt's son, who was up there one day, went away quite disappointed that he could not see them fire. And on those days when the cannonading did take place, I have heard the bystanders exclaim: "Go it, ye devils, and take better aim." There were many hairbreadth escapes, and considering the immense number of times they fired, it is extraordinary so few fell a sacrifice. A short time before the breaking out of the affray, we had built a foot-bridge across the creek at the back of Mr. Ussher's house. Captain Adams told me he was marching his men across when a ball struck in the bank close beside them. I also saw one strike the water under the bank where three officers were passing on horseback.

Doubtless you will ask where the balls were procured in so short a time for the use of the ruffians, for I can call them no better. Some they stole from the arsenals, but the greater part were cast at a foundry in Buffalo, the proprietor of which, I apprehend, entered into a bad speculation. But he was weak to think that the scrip would ultimately be paid, and that he should some day have a rich Canadian farm at the termination of the conquest, and there sit down with an "otium cum dignitate" like the Romans at the end of a Punic War. Whilst these outrages were perpetrated in front of Mr. Ussher's house, Mackenzie and the *General* were at the back part of the Island concocting mischief. The former framed a most imprudent proclamation which was published in the *Buffalo Journal*, and intended for general distribution here when their forces were strong enough to effect a landing. I do not intend to trouble you with many documents of this kind, as it would swell my pages larger than I wish. This, however, is a curiosity in the annals of history, so read it just to be convinced of the consummate impudence of a man who fled his own country as a mere adventurer, and who ultimately effected his escape here from a punishment he so richly merited.⁷²

The deluded people who perused this precious document began to think seriously that there would be a chance for plunder and a prospect before them of obtaining good farms with but little trouble. Under this false impression, meetings were held in various districts, where inflammatory speeches were

⁷² Mackenzie's long Navy Island proclamation of six pages appears in Lindsey, Appendix G. and a lengthy discussion of it in Dent, Vol. II, Appendix. (H.)

made by lawyers, clerks and others, which resulted in many hot-headed individuals taking their rifles and proceeding to the general rendezvous on Navy Island. During the excitement, sleighs laden with arms and provisions, provided at the expense of private individuals, were passing and repassing continually. That the names of those might not be made public who were active in the proceedings, money was forwarded by ladies who entered their names in the patriot cause. Well, with all the exertions made, and the immense advantages held out, to the praise of the respectable portion of American citizens be it said that not more than about eight hundred men could be collected together, and those, as I before observed, consisted of the most reprobate and abandoned classes of society, who were fit for little else than marauders and buccaneers, many of them doubtless glad of the opportunity to escape their own prisons.

The insurrection being quelled at Toronto and in the West, the Governor crossed the Lake to take a survey of the frontier. Landing at Niagara, he proceeded to Queenston and from thence to Chippawa, along the shore to Fort Erie, opposite Buffalo, the termination at that time of the guarded coasts. On his return he was accompanied by Mr. Merritt and two other gentlemen, who pointed out as they rode along everything worthy of notice on our own frontier, as well as the opposite shore and the Island where the rebels were encamped. I was standing opposite Mr. Ussher's, unconscious of their approach, when the Governor politely withdrew from his Company, shook hands and expressed his satisfaction at finding all along the line so vigilant and at their posts. I asked him when the marauders would be dislodged, as they were a source of great annoyance to us by their frequent firing. He replied that, in a few days, on the arrival of the artillery then on its way, it would be effected. At this intelligence from the fountain head we were satisfied. I have no doubt at the time this was fully contemplated, but on a Council of War being held, it was considered advisable, if possible, to spare the effusion of human blood. On leaving Chippawa, however, he left orders with the Colonels in command to use their own discretion.

The artillery at length arrived, and a number of men were despatched up the River to raise embankments and breastwork, preparatory to a general bombardment. This was done at night, the first set of men being obliged to retire from their work in consequence of cannon having been fired to dislodge them, which was soon effected. None of the workmen received any injury, but the works having first commenced in front of my friend's house, sad dilapidation ensued; the front wall fell in soon afterward, which rendered the building quite unsafe and uninhabitable. At length the works were completed, and our mortars and cannon being in readiness, a regular attack was contemplated, but so many schemes and plans were devised that nothing effectual took place after all. Three schooners were manned and stationed up the River under the command of Captain Graham, Lieutenant Drew and Lieutenant Elmsley, three gentlemen of confirmed bravery. They were to cut off all communication, by water, with Buffalo; then there were near one hundred boats of various sizes in readiness, which, when manned, were to effect a landing at one end of the Island, whilst the artillery were playing upon the centre and northern end; these, however, were quiescent, to try the effect, first of all, of the bombardment. When this commenced, the bravadoes were alarmed not a little. The 24-pounders and mortars raked the trees and the shanties, tore up the ground and killed some of the rebels;

but the main body still clung to the Island. Had the boats been ready manned, a landing might with ease have been effected during their panic: this scheme was, however, overruled; so much for a multiplicity of councillors, in which we are told safety consists. The prolongation of storming the Island had a bad effect, inasmuch as the alarm was unabated; it also drove many peaceable families from their homes and domestic firesides at an inclement season of the year. I never could comprehend the policy of their operations, further than what I stated before—the desire to prevent the dreadful massacre that must have ensued, for very few I apprehend would have escaped, so indignant were the people on this memorable occasion.

That you may judge the situation of the contending parties, I hand you a small map of our positions, sufficient to guide your ideas to the spot remarkable in history. There lay entrenched a handful of desperate fellows who kept a whole country in agitation for upwards of a month, and we residing within cannon shot, liable at a moment's impulse to have a ball sent through the house, or perhaps a leg shot off whilst perambulating the bank of the River.

From the time of their arrival there, on the 13th December, to the period of their evacuation on the 15th January, you may be sure such restless adventurers were not idle in concocting mischief. Fortunately, however, through the fickleness of their plans and their constant differences and quarrels, no measures were effected for our annoyance further than what I mentioned relative to their occasional cannon exercise and rifle shooting. It was imagined, however, that one night they were ripe for some expedition, and in order to give signals and divert us from their movements, they lighted up a machine which was moved to and fro on the Island. From it issued a most dazzling and brilliant light, which could be seen for many miles around. It was supposed to consist of tar barrels and other inflammable materials, which burnt for several hours. No movement however took place. They had schemes to divert our attention in various ways, which were afterwards acknowledged.

Van Ranselaer had full powers vested in him to conduct all the military operations, and that there should be no obstruction toward carrying his plans into effect, he had also the power to arrest any member of the executive, as recommended by Dr. John Rolph, who was their president in Toronto whilst their plans were maturing. All appeared to unite in their General's plans with the exception of Mackenzie, who, being gifted with such fickle, arbitrary and impatient views, ultimately thwarted every measure contemplated. He would suggest fifty schemes and in as many minutes abandon them for new ones, a pretty character to carry into effect the revolutionizing a colony so powerful as Canada.⁷³ At heart, he proved to be an innate coward, being the very first to be frightened at the cannonading and bombardment of our artillery, so that the only step left for Van Ranselaer to pursue was to keep him employed in their general correspondence, which was freely carried on by spies, notwithstanding our vigilance. They knew all our movements, although we could gather nothing of their's from their peculiar locality

⁷³ Coventry's delineation of Mackenzie's hypochondriac condition here is not essentially different from that in Dent, Vol. II, p. 15, etc. Curative methods had not then attained the development they have since done, and allowance must be made for this fact. (H.)

on an island. At one time they contemplated crossing over, a few miles up the River, secreting themselves in the woods, and obtaining from 200 to 300 rebels still at hide and seek, marching on through the woods and bye-places to Niagara, seize upon the steamboats lying there, and crossing over direct to Toronto. Such a visionary plan could never have succeeded, as we had strong reinforcements all along the frontier, and dragoons patrolling in every direction to convey the earliest information. Although Mackenzie himself approved of the scheme, and volunteered to be foremost in coming over, yet his coward heart failed him. Our 24-pounders and bombshells aroused all the horrors of a guilty soul; he made his escape from the Island at a time when everything was planned and a steamboat ordered to bring them over. He secreted himself in the house of a friend at Buffalo, and soon afterward levelled as great abuse against the American journals as he had formerly done against our own. He even proposed that the men who had been fools enough to join his standard, should charge the American troops stationed to watch their movements. Afterward they were to seize the boats and embark from the city. This produced an altercation between the head of the executive and the military. This fracas induced Mackenzie to leave abruptly for Rochester, where he hoped to gain sufficient confidence to establish a printing press at their expense, but they knew better.

Van Ranselaer, being now left to his own management, and placing no reliance upon any assistance to be obtained so near our headquarters, turned his attention westward, hastened by the arrival of General Scott⁷⁴ from Washington with 600 regulars to put a stop to their proceedings. During this time, their forces kept increasing, many placing more confidence in the firm decision of Van Ranselaer than in the pusillanimity of Mackenzie, who never had any regular organized plans. Knowing Scott was too brave a general to tamper with them, they had recourse to every subterfuge to evade his scrutinizing eye. A large party armed with rifles set out from Buffalo, as they stated, to have a regular fox hunt in Cattaraugus, a district away from the scene of action. Toward night, however, they veered round and contrived to reach the Navy Islanders, so badly was the coast guarded, and so little precaution taken, notwithstanding the profession of the American government to enforce a strict neutrality. The fact is, they had not sufficient force to guard the lines. Their regular troops were in Florida, and the militia were determined not to act, so that the handful of men that General Scott brought with him was of no use unless concentrated at one particular point, to which they ought to have repaired at first and cut off all communication. As a proof of this assertion, Mr. Garrow, the marshal, met a party with a United States field piece proceeding to the rebels and was allowed to pass, from his inability to detain the parties. Governor Marcy, also, although a long time in the service, was equally unfortunate in his movements. It was a novel contest that required a man of energy and promptness, without any tampering to preserve popularity; but it is not my province to censure our neighbours further than the statement of matters of fact. My object is to shew you our proceedings against the machinations of an artful, designing, lawless set of villains, whose ostensible object was plunder, could they find

⁷⁴ This was General Winfield Scott; taken prisoner in the War of 1812, he lived to take an active part in the Mexican War, and to be Commander-in-Chief of the Army of the United States at the outbreak of the Rebellion of the Southern States.

a leader to carry their plans into execution. Thus things went on from day to day for near a month, with no prompt measures on either side to dislodge the marauders. This supineness I equally condemn in our own commanders as with those on the opposite shore. They how-*ever*, took a different view of the question, preferring to act on the defensive, and to await the result of their landing. They objected to storming the Island on account of losing so many lives. But where is the difference, I would ask, in accomplishing an object, whether the sanguinary affray takes place on an island or the main shore? As things ultimately turned out, their quiescence, however, succeeded, but nine cases out of ten in the annals of history, a speedy operation at the onset is a great saving of human life. One of their expectations was that the marauders would be starved out, it being considered impossible that 800 men could be fed long together upon private subscription. As it was, they frequently ran short, and on one occasion actually stole 20 barrels of our pork, to say nothing of flour.

After an ineffectual attempt of General Arcularius to bring Van Ranselaer to any terms, it was left to General Scott, on his arrival, to compel him to surrender the cannon and arms which had been stolen from the American arsenals. Accordingly, on his arrival at Manchester, contiguous to the Falls, he despatched a messenger over to the Island for Van Ranselaer to wait upon him relative to the cannon, &c., assuring him on his word of honour that he should not be molested. Accordingly, our hero arrived in his boat, mounted with an American swivel cannon, and proceeded direct to the hotel at Manchester where the General and several of the Buffalo authorities were in waiting. Some friends of mine were over there at the time, anxious to see a man whom they considered a second Bolivar. They described him as remarkably tall, well dressed in black, with a military cloak; about 35 years of age and endued with a countenance that never appeared gifted with a smile. On landing, a messenger handed him a large bundle of letters which he hastily read and thrust into his pocket, taking but little notice of any of the bystanders. In fine, he seemed wrapped up with his own ideas as a hero or some individual who was engaged in an expedition. His eye was keen and penetrating as Warwick's a few months ere he requested the loan of six feet of earth to be buried in.

On reaching the hotel, he took his seat amidst the assembled conclave and said but little, listened attentively to the lecture of the General on the illegality of his conduct, the anxiety of his father to quit so disreputable a life, the danger he stood in from the anger of his own government, who would assuredly prosecute him for retaining the stolen cannon and arms, independently of the utter hopelessness of so futile an attempt to subvert a nation whose internal government had been misconstrued and misrepresented by an unprincipled individual. He called upon him therefore, immediately to deliver up the stolen property or he would certainly be compelled to do so by the force of arms. This reasonable request was also seconded by several gentlemen of high respectability in attendance, who implored him to consider the folly of any attempt to persevere in a course so derogatory to the character of a family so inimical to his proceedings, as well as the government to which he owed allegiance. In reply, he said but few words, was not aware he held any property belonging to the state: considered it belonged to private individuals, but on his return would consult with his associates and furnish a

reply within the term of six hours specified. He wished them good morning, went quietly to his boat and proceeded to his quarters on the Island unmolested according to the agreement entered into.

Things had now arrived at a crisis, and although possessed of nerve, and a determination, if possible, not to be thwarted in his reckless plans, yet like all other General Bobadils, a safe retreat was no mean subject of consideration, especially as he was now placed, as it were, between two fires. Accordingly, a short period prompted them the course to pursue, especially as their supplies were nearly gone, with the exception of water, a beverage at all times excellent to allay thirst, either in peace or war. They therefore speedily determined to collect the stolen cannon as a matter of necessity, place it in a boat and send it over, which was accordingly done, rowed across the river and landed clandestinely on the American shore to the care of no one. At 2 o'clock the following morning the posse comitatus prepared for departure, which they effected as quietly and as little known to us as on the day of their first arrival.

They marched through the dreary woods on Grand Island, on a bitter cold morning, and reached Tonawonta, where numbers who had not secreted their arms were disbanded. Many took a circuitous route and kept the quiet possession of their rifles and muskets. They were in a most beggarly and miserable plight as you may suppose, many of them nearly famished, who had to feed like hogs on peas and potatoes, and as full of vermin as a skunk or a polecat. Well for them their encampment was broken up that they might escape dying with hunger, as we had stationed three schooners to cut off any supplies from Buffalo, which were expected by the steamboat *Barcelona* which was to take the place of the *Caroline*.

Doubtless General Scott's arrival materially hastened their departure, although in all probability they would have pursued a similar course after prolonging their encampment, as the 24-pounders and bombshells were unwelcome messengers about their ears.

Nearly a day elapsed before we knew of their departure and great conjecture arose as to their point of destination. In the course of the day one solitary individual was seen waving a flag but this was looked upon with suspicion. In the afternoon authentic intelligence arrived of the event, yet, very many even then were incredulous, altho' from the circumstances of seeing none on guard as usual, it was apparent some movement had taken place. To settle the question, a party volunteered to go over; it was considered a hazardous undertaking, more especially as many surmised that they had excavated subterraneous caverns to enter, and knowing the schemes they planned to deceive us it was no wonder we were anxious to learn the result. At the time, the information of very few could be relied on, as so many strange rumours were afloat, and so many spies over here awaiting our movements and spreading reports to mislead us. A great number assembled on the shore as you may imagine, to know the result, and many anxious hearts were relieved when a general huzza proclaimed that the island was once more in our possession and the British flag flying.

Their movements had been so rapid to clear out, as they termed it, that one poor wretch was left behind,⁷⁵ who was glad enough to hail his rescuers from the thralldom he had so long been entrammelled in. He stated that he was asleep, and knew nothing of their movements; on his examination but

⁷⁵ He was arrested as a spy, but soon released.

little could be elicited from him, further than that he had been a hewer of wood and drawer of water and was heartily glad that the expedition was abandoned. He was soon released from captivity, having been taught a lesson for his folly that he will not easily forget.

Had it been Brobdignag Island, greater curiosity could not have been evinced to see it. An old shoe or a slip of cloth were as great curiosities as some of the relics they show you in France; grape shot, pieces of punched iron from steam boilers, furnished from Black Rock foundry, were as precious as current coin; and as to pikes, they were trophies of too intrinsic value to fall to the lot of many: they decorated halls and curious cupboards, whilst half a bombshell or a cannon ball embellished a lady's work table. The few of the rebels who wore shirts carried them away, filthy as they were, on their backs, as scarce a vestige of linen was found with the exception of part of the tail of a shirt that had bound up a wounded leg. Nothing can exceed the miserable condition of a buccaneer's life, far worse than that of savages, for they know no better.

The number who were killed or wounded by our bombardment was never ascertained.⁷⁶ as their burying place was on Grand Island, where they occupied a log-hut as hospital. One newly made grave was found, which, on digging the earth away, was found to contain the body of a poor wretch who was supposed to have been shot by their own party, as he was lying with his arms pinioned: who this individual was has never been ascertained.⁷⁷

The miserable state of existence they must have endured baffles all description. It is almost impossible to convey to you the disgusting scene which was exhibited. The shanties wherein the miserable wretches bivouacked were scarce fit receptacles for pigs, being strowed with beans, peas, pork rind, vermin and dirt. Their beds were composed of brushwood, and nothing to shelter them from the inclemency of the weather but pine branches. Here they congregated at night, eating, drinking, smoking, swearing and sleeping. For an occasional bivouac on a deer hunting expedition, such a lodgement would pass current, but for fifty or sixty human beings to assemble nightly for one month together, betokens a race of desperadoes worse than savages.

Mrs. Mackenzie⁷⁸ was over there part of the time living in a dirty house at the back of the Island, which I before described to you. The only accommodation for her at night was on a shelf covered with straw, where she could hear all the swearing and contention that was going forward between her husband and the General,—a forlorn fate for a woman who once moved in a respectable sphere of life, now united to a degraded being possessed of every ignoble propensity. She has a large family,—an outcast upon the wide world

⁷⁶ Existing accounts mention that the casualties on the Island were one killed by a round shot and one slightly wounded by a splinter. Dent, Vol. II, 224, note.

⁷⁷ I have not seen any reference to this circumstance in any of the other accounts.

⁷⁸ Mrs. Mackenzie, *née* Isabel Baxter, a native of Dundee, was married to William Lyon Mackenzie at Montreal, 1822, when Mackenzie was living in Dundas. She was a woman of sterling character, a devoted wife and mother. She was the only woman who spent any time on Navy Island. "She arrived there only a few hours before the destruction of the *Caroline*, and remained nearly a fortnight with her husband, making flannel cartridge bags and inspiring with courage by her entire freedom from fear all with whom she conversed. At the end of about a fortnight, ill-health obliged her to leave." Lindsey, Vol. I, 38; Vol. II, 163.

Navy Island was abandoned by the "Patriots," January 14, 1838. Dent, Vol. II, 223.

which execrates the very name of her worthless partner, who having left the path of honest industry had hurried headlong into a vortex from which he can never be extricated. Altho' punishment is withheld from him further than a guilty conscience, bad enough at all times, yet the retributive hour must arrive when he will have to suffer for the horrid calamities he has inflicted upon so many of his deluded and unfortunate fellow creatures.

It seems almost incredible that one poor halfbred⁷⁹ Scotchman should have been the cause of all this turmoil, but such is the weakness and folly of mankind generally, especially where any novelty occurs, that a visionary brain, however reckless, always aspires to obtain converts, until the fatal bubble bursts. It was so in the present instance. Landed once more on their own shores, you would imagine they would slink away to their homes and betake themselves to some honest employment. Not so: the delusion still continued and many imagined that the thorny road they had passed was merely one of the routes to the Garden of Eden, in the shape of 300 acres of land, which they were ultimately to enjoy when their labours were terminated.

When Mackenzie ran away from justice and was known to be secreted in Buffalo, it would have been a politic measure had the authorities complied with the Governor's request and given him up. No one can be more averse to this proceeding than myself in a general way, because many flee their country from persecution and untoward events over which they have no control. But when an abandoned character,—notorious as an adventurer, a robber, an incendiary, a murderer,—flee from justice, it is the bounden duty of every government, as a protection to themselves, and in accordance with the treaties, to deliver up such an individual to the law as a dangerous member of society at large. This was the case with Mackenzie. Mr. Bethune was sent by the Governor to Buffalo to claim the rebel fugitive, but Governor Marcy, on the part of the United States, declined complying with the application,⁸⁰ alleging that the offences charged against him, being incidents of the revolt, merged in the higher crime of treason, which was a public offence only. Governor Marcy was doubtless glad to get rid of the application, which he had a favourable opportunity of doing in consequence of Mackenzie suddenly quitting Buffalo with Van Ranselaer and going over to Navy Island, over which he said he had no jurisdiction. So the viper was harboured, by an underhand movement, to sting the very parties afterward whose fostering hand had protected him. This is not the first time that designing men have been taken in their own craftiness, and fallen into the pit which they had dug incautiously for others. We were the more astonished at the supineness evinced on this occasion, on account of the President's proclamation issued on the 5th, wherein Martin Van Buren states that he is fully determined rigidly to enforce the laws of Congress in regard to the observance of a strict neutrality. Now as our Governor did not apply for Mackenzie to be given up on account of his political opinions, I apprehend there was some partiality shown in favour of Republicanism, by retaining him, when they

⁷⁹ A mere vituperative adjective: Mackenzie was a pure Scot.

⁸⁰ This account of the course followed by Governor Marcy agrees with that given by Lindsey, Vol. II, p. 129, both writers having evidently derived it from public prints of the time. (H.)

There can be no doubt now that Governor Marcy was right in International Law: Mackenzie was no more guilty than the St. Albans Raiders whom Canada refused to deliver up to the United States.

and him in their power so frequently, as he passed and repassed to Buffalo on his way from Navy Island.

The same Government which professes to act justly has at different times demanded their subjects from us for theft and misdemeanors, and which applications have been strictly attended to. Yet, in a case of so heinous a nature as robbery of the mails and private individuals, incendiarism and attempts at assassination as in the cases of Powell, Brooks and others, that professed friendly, equitable Government, for which the marshal was responsible, refuses to comply with the Governor's request to do one single act toward furthering the ends of justice advantageous to the quietude and harmony of both countries. Surely after this no individual, however depraved, can with propriety be given up on our side. You cannot be surprised then, from this inference, that tranquility would be soon restored, when the delinquent in question was allowed to roam about their country, holding meetings, publishing seditious papers and enlisting men after the evacuation of their stronghold.

The intentions of the American Government at the fountain head, were doubtless sincere; for Mr. Forsyth distinctly says, in his despatch to the district attorney, that every individual without distinction is to be immediately prosecuted who violates the laws of the United States, whose declared determination was to preserve peace and amity with foreign powers. He even mentions the names of Mackenzie⁸¹ and Doctor John Rolph, the two leaders who had fled their country, yet no proceedings were instituted against them: they were allowed to roam at large and not only stir up sedition but even to be necessary to robbing the arsenals. At any rate as far as Mackenzie was concerned, he then was taken up, examined and liberated upon bail, an act of great injustice to the peace and welfare of both countries. This subject, however, I leave in the hands of the two respective governments and proceed with our narrative.

The ground was covered with snow, no road through the forest but their own making, no light but the stars to guide them, and the thermometer 10° below zero, yet withal the ardour of the fugitives was not damped, altho' many were wounded and half starved. Economists of the present day talk of many being degenerated in physical strength, but it appears to me that when upheld by energy and the desire of aggrandizement, exploring or conquest, he has the same power of undergoing fatigue and privation as ever, exemplified in the case before us, in polar discoveries, in journeys across the Rocky Mountains or various other parts of the globe. Instances have come under my own observation of men travelling from 150 to 200 miles over the snow with snowshoes, not a hut on the way for shelter and reposing at night amidst a temperature of from 18deg. to 20deg. below zero, surrounded with snow only, yet these sons of the Universe were healthy and capable of performing similar exploits. I saw them contiguous to the shores of Lake Huron and found it was no uncommon feat to perform. Your sympathy therefore for the marauders before us who had so short a distance to travel, need not start one tear from your eye, nor induce you to heave a sigh for their apparent forlorn condition.

⁸¹ Mackenzie was afterwards prosecuted and confined in the common jail at Rochester for nearly eleven months. Dr. Rolph took no part in the sedition operations of the Rebels and "Sympathizers."

Well, they continued their desolate march and finally landed, some at one place, some at another, anxious to preserve their muskets and rifles from the searching eye of General Scott, who, to convince the Government he had done something, managed to get hold of some of the ill-gotten booty; but so little precaution was taken to place them in a safe asylum that even some of these were afterward purloined when occasion required them to join Sutherland, who had gone forward to Cleveland, a port on Lake Erie at the junction of the Ohio Canal. Here I leave them to reconnoitre.

Our forces on the frontier now turned their thoughts homewards, having performed an arduous duty in watching and guarding the frontier. They would nevertheless have gladly exchanged their inactive life for bustle and conflict. I frequently heard them say they longed for the General and his forces to come across, that they might show them the contempt they were held in. So great was their enthusiasm for the protection of their property and families, that they daily panted to go over and dislodge them. Perhaps after all, things turned out for the best, for altho' glory is a word of powerful meaning, yet there is but little satisfaction for those who fall in the conflict, when the end may be finally accomplished without the loss of many valuable lives.

When it was ascertained the route the rebels had taken, the artillery was removed. The schooners moored in the Chippawa, and the greater part of the troops who had performed the most arduous duty, were ordered home. A general move took place, preparatory to which the Colonel thanked them on behalf of the Governor for their loyalty and services, not doubting but when required they would be ready and willing to buckle on the shield of defence and rally round the standard of their Constitution in behalf of their country's cause. To this appeal there was no dissent, and "God Save the Queen" resounded midst universal applause.

A Trial for High Treason in 1838

By

HONOURABLE WILLIAM RENWICK RIDDELL,
LL.D., F.R.S.C., etc.



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XII.

A TRIAL FOR HIGH TREASON IN 1838.

BY THE HONOURABLE WILLIAM RENWICK RIDDELL, LL.D., F.R.S.C., ETC.

The extraordinary fiasco of Mackenzie's Rebellion in 1837 had unhappy results for many real lovers of their country: some misguided persons lost their lives, many were exiled, many lost their lands, and not a few were in deadly peril of death or exile, but fortunately escaped the worst.

It is of some of these last that this paper is intended specially to deal.

Mackenzie's attempt to take possession of Toronto occurred early in December, 1837,¹ and rumours of his operations ran like wildfire throughout the Province.

In the Township of Eramosa a meeting was called of the inhabitants at the Central Schoolhouse about seven miles from Guelph to consider what was to be done. The meeting, held on December 7, was attended by some sixty or seventy persons of all politics. James Benham was called to the chair—a man of high standing in the community and one who desired reform in the Government; he appears to have called the meeting. James Peters was appointed secretary—the Township Clerk and of equally high standing and like views.² Benham addressed the meeting and a paper was largely signed by those present. At once the story went abroad that some of those who had been at the meeting had there plotted armed insurrection and were about to carry out their treasonable scheme.

Walter King, who had spoken at the meeting, laid an information against James Benham, James Peters and others before "Squire" John Inglis, a Justice of the Peace in Guelph.³ Inglis was a warm supporter of the Government and took proceedings at once. Following the old practice of Fielding and other English magistrates he gathered some thirty men under arms to "break up the rebel nest in Eramosa." Before daybreak, December 14, 1837,⁴ a detachment under Inglis arrested Peters and scarcely gave him

¹The outbreak was arranged for Thursday, December 7, 1837; but Monday, December 4, the Rebels were advancing and Col. Moodie was killed. Tuesday morning was spent in parleying and that evening all was over.

²Of James Peters it is said that he was one of the very few in this most drunken Province who never used alcoholic beverages, even at "bees." An "active, energetic, consistent Congregationalist, a Deacon in the Church at Speedside from its formation, always in the front ranks of the progressive, liberal-minded citizens of his time." *Guelph Weekly Mercury and Advertiser*, Aug. 2, 1906. The late Dr. George Peters, of Toronto, was a grandson; and Dr. Janet Armstrong, of Cobourg, is a granddaughter.

³At that time, and for years thereafter, in the country places of this Province the title "Squire" was given popularly to an active Justice of the Peace; the custom is not yet dead. They have not yet attained the title of "Judge."

⁴James Peters, in an account in the *Guelph Weekly Mercury and Advertiser*, Aug. 2, 1906, says he was arrested "before daylight one morning, that is on the 13th of December, 1837"; but Benham in an almost contemporary statement says, "on the night of the 13th or the morning of the 14th December, 1837, John Inglis, Esquire, one of Her Majesty's Justices of the Peace, with a body of armed men amounting to 30 or more entered our dwelling houses, with fixed bayonets and arrested James Benham," etc.

time to dress. Next the cavalcade of two sleighs went to the residence nearby of James Parkinson, and after getting breakfast there arrested one of his sons of the same name. The elder Parkinson had been a staunch supporter of the Government, but that did not help his son. James Benham, John Butchart, Hiram Dowlan, Calvin Lyman and William Armstrong were arrested in the same way. They were taken to Guelph and four of them, Parkinson, Dowlan, Lyman and Armstrong, had a formal examination there before Inglis and were admitted to bail;⁵ but those who were considered the ringleaders received no such courtesy; they were sent at once without examination of any kind to Hamilton Gaol, and Benham, Peters and Butchart, after a long sleigh ride, arrived at Hamilton at 10 o'clock p.m. There they lay until the session in April, 1838, of the Commissioners under a Special Commission of Oyer and Terminer and General Gaol Delivery for the District of Gore.

We are so fortunate as to have at Osgoode Hall the original notes made by the presiding judge.

The Honourable James Buchanan Macaulay was the presiding Judge at this Special Assize; he had been a Puisne Justice of the Court of King's (Queen's) Bench since 1829 and was in 1849 to become Chief Justice of the Court of Common Pleas when it was formed in 1849, and Sir James and a Judge of the Court of Error and Appeal in 1857. He was a sound lawyer and a fair and impartial judge. When the Special Court of Oyer and Terminer and General Gaol Delivery for the District of Gore opened at Hamilton, Thursday, March 8, 1838, Mr. Justice Macaulay had as his associates, Hon. James Crooks, James Racey and Richard Beasley, but these gentlemen had no real authority or voice in the proceedings. A Grand Jury was sworn, Mr. Kirby chosen as foreman; the Grand Jury was charged and the Petit Jury sent home until Friday, March 23. The Grand Jury began at once to find True Bills amongst them—one against the seven men from Eramosa; while fifteen accused were released as nothing was found against them.

The first of those accused of High Treason to come before a Petit Jury were the seven from Eramosa who on Tuesday, March 27, 1838, were placed at the Bar to be tried for their lives.

The Crown Counsel was the new Solicitor-General, William Henry Draper;⁶ of English birth and descent he had run away to sea when a lad and arrived in Canada in 1820, not yet twenty years old. Abandoning the sea he came to Port Hope and entered the Law Society; by diligence and natural ability he achieved his call in 1828. Almost at once he obtained a place in the office of the influential Attorney-General, John Beverley⁷ Robinson, and soon entered politics on the Tory or Government side. He was a very sound, if somewhat narrow and technical, lawyer; and he

⁵Peters in the *Mercury* article says, "after being bled, in the pocket of course"—I assume he means paying costs of the Bail-bonds, etc.

⁶He had succeeded Henry John Boulton as Solicitor-General in March, 1837, when Boulton succeeded in the Attorney-Generalship Robert Symptom Jameson, who was made our first Vice-Chancellor.

prosecuted these treason cases with vigour. With him there were no extenuating circumstances: the accused was either guilty of treason, or he was not.⁷ The Solicitor-General was ably and strenuously assisted by Allan Napier MacNab a comparatively young practitioner; he was called in 1826; but an old soldier—he had fought in 1812—and one who had done magnificent service to the Loyalist cause during the ill-timed, ill-considered, ill-fated rebellion. He had in January, 1838, been created the first Queen's Counsel for Upper Canada and was to live to be knighted and to become Prime Minister of the United Canadas.

The men of Eramosa (and others) had engaged Miles O'Reilly, a young lawyer practising in Hamilton; he had been called in 1830 and had a high reputation for ability and eloquence⁸—and they paid him a fee of “\$10 each or \$70 for the job.”⁹

By the Statutes of 7 Will. III, c. 3, and 7 Anne, c. 21, the accused were entitled to receive ten days before arraignment a copy of the indictment, a list of the witnesses and of the jury summoned, and this they did: but not only the three who were in Hamilton Gaol but also the four who had come from Eramosa to answer according to their recognizance were compelled to stay in gaol until the day set for the trial.

The tremendous indictment was read;¹⁰ they were all charged with conspiring to subvert the Government, to levy war against the Queen and to put her to death, and such like wicked and traitorous compassings, imaginings and intentions; they were false traitors, etc., etc. Of course they pleaded not guilty.

The evidence was very contradictory. William Campbell, of Eramosa, told of all the accused being present at the meeting and that Benham had spoken saying that Lower Canada was in possession of the rebels and that “we should keep in favour with the Lower Province and do the best we could for ourselves;” that the Reformers were in possession of Toronto, and such like. There is considerable insinuation but nothing that can be called evidence of treason in this testimony. Walter King was the next witness; his evidence, if believed, was almost conclusive; he said that Benham said that “Canada should throw off her allegiance to the British Crown;” that the meeting was called because of the news that Mackenzie had taken Toronto and to assist Mackenzie in the insurrection, all but five or six

⁷In an article in the *Guelph Weekly Mercury and Advertiser*, Aug. 2, 1906, James Peters says: “The late Sir Allan MacNab and the Solicitor-General, afterwards Judge Draper, were Queen's Counsel, and if we did not get our necks stretched it was not their fault.”

Draper became Solicitor-General 1840, Puisne Justice of the Court of Queen's Bench 1847, Chief Justice of the Court of Common Pleas in 1856, Chief Justice of the Court of Queen's Bench and President of the Court of Error and Appeal in 1863; he died in 1877.

⁸Miles O'Reilly, Q.C., succeeded William Leggo (of Leggo's Chancery Practice and Forms) as Master at Hamilton, 1872; this office he held until 1890; he was a Benchet, 1871-1875; he had a respectable practice when at the Bar.

⁹The language of Mr. Peters in the article mentioned in Note 7.

¹⁰A copy is set out in the article referred to; those interested will find a form in Chitty, Criminal Law, 2nd Edit., 1826, Vol. II, pp. 67-84.

out of the hundred present being of that mind, etc. Robert Grindell (or Grindle) followed, but his evidence was ambiguous; he did not swear as had been anticipated or as he had sworn in a deposition before Mr. Geoffrey Lynch. The whole case was weak, and Mr. O'Reilly moved for the discharge of the prisoners on the ground that there was no evidence of a conspiracy to levy war against the Queen, etc., as charged; but Mr. Justice Macauley ruled that there was some evidence to go to the jury and the defence proceeded.¹¹

O'Reilly followed the modern practice and called his witnesses without opening to the jury. John Shaw swore that Benham did not advise to throw off allegiance or to join Mackenzie; that the whole object of the meeting was to protect the life and property of the settlers in Eramosa, mutual defence, and a meeting was arranged for a week later if Toronto was taken; they were to protect themselves from Mackenzie; there was no talk of rebellion. Joseph Parkinson testified to much the same effect, as did James Smith and George Sunley.

The counsel for the prisoners addressed the jury, and MacNab replied; then the Solicitor-General claimed the right to follow—quite against our modern practice although good in strict law—and had his claim allowed.

The charge was impartial: the jury was told that if the prisoners at the meeting declared in favour of revolt, openly approved of the rebellion and pledged themselves to support it, they would come within the indictment, as it was of common notoriety that the object of such rebellion was to overthrow the Government by force; but that if what was meant or contemplated was self-preservation, mutual protection, reform properly so-called as distinguished from rebellion or revolt, the verdict should be for the prisoners. "The jury retired and in just eight minutes returned into court with a verdict of not guilty."¹²

¹¹In Mr. Peters' Statement in the *Guelph Weekly Mercury and Advertiser*, August 9, 1906, he says: "The evidence was so much in our favour that we told our Counsel we were willing to submit our case to the jury without examining any of the eight witnesses we had on our behalf." If such were the case, Mr. O'Reilly did not risk that course because he called four witnesses. Mr. Peters is apparently under a misapprehension as to the responsibility for calling these witnesses, for he says: "The crafty Queen's Counsel (Draper and MacNab) would not consent to this arrangement probably expecting to get something out of our witness they could not get out of their own, but after examining three of them they gave it up for a bad job"; this is quite incorrect.

¹²The language of Mr. Peters in the article mentioned in Note 11; he says: "After seeing the political complexion of the petit jury . . . our chance of an impartial trial was very small." In the previous article he said that "the Grand Jury . . . nineteen in number, were all pure, thoroughbred Tories. . . . There were eighty petit jurors summoned, namely fifty-seven Tories to the backbone and twenty-three Reformers."

The conviction of Lount and Matthews, in Toronto, in January, 1838, was believed by the time of the trial of the Eramosans to be about to be followed by their execution; and the country at large did not desire further convictions unless guilt were clearly proved. Moreover, Canadians, while bitter enough partisans at election times, do not usually carry political feeling so far as to desire the shameful death of political opponents.

Mr. Peters adds: "Six of the seven jailbirds are still (1866) living—Clear Grits yet. I do not think any of them has given a Tory vote since."

Of the twenty-one others tried for high treason at this Assizes ten were acquitted and eleven convicted;¹³³ of the latter class, one died in gaol, one escaped and the statute of March 6, 1838, 1 Vic., c. 10, saved the life of one of the rest.

That statute provided that before arraignment every person charged with treason might petition for pardon; and, if pardoned, the effect would be the same as on an attainer; and the pardon might be on condition of transportation or banishment for life or for a term of years. In all the other cases there were pardons either conditional or otherwise, so that no one was executed.

I here subjoin copies of letters of the time, kindly furnished me by Dr. Janet M. Armstrong, of Cobourg, granddaughter of James Peters and of George Armstrong, brother of William Armstrong. I have also to thank Dr. Armstrong for copies of the *Guelph Mercury and Advertiser* to which I have referred.

| | |
|---------------------------|--|
| Wednesday, March 28 | Horatio Hills, Guilty. Willard Sherman, Not Guilty |
| Thursday, March 29..... | Stephen Smith, Guilty. Nathan Town, Guilty. |
| Friday, March 30..... | Charles Walrath, Guilty. William Lyons, Not Guilty. Oliver Smith, Not Guilty. |
| Saturday, March 31..... | Adam Yeigh, Not Guilty. George Rouse, Not Guilty. John Leonard Uline, Not Guilty. Samuel Marlatt, Not Guilty. Isaac B. Malcolm, Guilty. Finlay Malcolm, Not Guilty. Norman Malcolm, Not Guilty. Peter Malcolm, Guilty. Ephraim Cook, Guilty. Elias Snyder, Guilty. |
| Monday, April 2..... | William Webb, Guilty. John Tufford, Guilty. John Hammill, Guilty. |
| Tuesday, April 3..... | Solomon Lossing, J.P., Not Guilty. |

Those found guilty were sentenced Wednesday, April 4, and the Court adjourned.

Horatio Hills died in gaol after his sentence had been commuted to banishment for life; Charles Walrath escaped from gaol; Stephen Smith was pardoned on giving security to keep the peace and be of good behaviour for three years; Isaac B. Malcolm is said to have petitioned under 1 Vic., c. 10, and received a pardon on the same terms; Nathan Town who was an unlicensed physician, Peter Malcolm, Elias Snyder, William Webb, John Tufford and John Hammill were treated in the same way as Stephen Smith; Ephraim Cook, a physician, was banished for life; he had received his license to practise only in April, 1831.

See Lindsey's *Life of William Lyon Mackenzie*, Toronto, 1862, Vol. II. pp. 391, 392, 393. There is an evident error on p. 392, as Nathan Town is said to have been acquitted; Lindsay's "Civil Court" means this Special Oyer and Terminer, and he frequently makes a mistake in the dates.

Endorsed "Mrs. Hannah Peters, Eramosa."

HAMILTON GAOL. Dec. 30th, 1837.

Dear Wife & Children:—

I send these few lines to inform you that I am in good health but troubled with a tickling Cough. I should be very glad to hear that you are all well and as much Reconciled to your present circumstances and separation as myself. I expect you would like to know something of the situation of myself and my companions, who has been lodged in Malone's Hotel (this is the Jailor's name) and methinks the Dear Children are often wishing to know what kind of a place Father is in, and in order to satisfy their innocent curiosity Shall endeavour to give a short account of my present Residence, and the number of our Family, which at present amounts to 45 in this part of the House, containing two rooms each about as large as our shop, these are well lighted and ventilated and 12 feet between the floors. We have also a spacious Hall of 8 or 10 feet wide, by 26 long, the Hall door is made of good oak six inches thick, and the windows well secured with Iron grates, so we have no fear of thieves or Robbers, And to conclude this hasty sketch shall just mention that it is the best House in the Town. We expect ten of our number to remove into another part of the house tomorrow morning. The high Sheriff visits us every day when at home and has certainly shown us much kindness. He has been with us this evening and Intimated that it is probable that a special Commission will be appointed to examine into the nature of the charges said to be against us. We hope that this will be the case for we have no desire to see Toronto at her Majesty's expense; and if we must be under confinement we have no reason to expect better treatment at any other place and should we remove we are afraid that it will be much worse. I forgot to mention that there is a Respectable Phisian or Doctor who comes and offers his services which has been sometimes much needed. Our company consists of one ex-member of Parliament, three Doctors, and five that either is now or has been school masters. We have made some Bylaws which is calculated to promote health, comfort and cleanliness which you will see if there is room in this letter. I wish in this place to acknowledge Mr. Malone's kindness unto us and if ever it should be in my power I should be very ungrateful if I did not make some suitable return.

Dec. 31. The Jailor has favored us last night with the Hamilton Gazette which contains the Speech of the Lieutenant Governor at the opening of the Provincial Parliament and also MacKenzie's Proclamation and as near as I can see without Spectacles the coming week is likely to be the most eventful one that has been known since 1812. And I must confess that there is a gloomy prospect for us as it Respects our examination: for nothing can be done at present owing to the excitement which prevails at this eventful Period. I have heard your William is with you at present. If it true I want him to get 2 new straps for the Harness and unless the leather is very heavy they ought to be double and any business which is necessary to be done from home I want it to be done with the Mare. And if it should happen that I am detained here which is very likely at present I would like him to get John Kennedy or John McKerlie or any of the Neighbours to fetch Wheat or Barley to Dundas but as my note is not

due to Charles until the 1st of February it is best to let the grain remain at home as long as possible hoping that things will be more settled ere that time arrives. However, I do not wish you to be governed altogether by my directions for I have been so long from home and you have never favoured me with a letter so that I am ignorant of how you are getting on at home. You will exercise your own Judgment according to circumstances. I hope all the children are industrious—at least all that is able to work, and if they have any sympathy or love for their Father which I do not doubt in the least, I wish them to render implicit obedience to your commands; hoping you will not abuse your Authority over them I shall now close this letter by wishing each of you a happy New Year. I received supplies yesterday from somewhere, least it seems to me they did not come from you. You need not send anything more until further directions as the mess received heavy supplies at the time. Give my best respects to your Father and Mother and all your Brothers and Sisters & Uncle Peter, to my Mother & to George & Mary Ann, to John, & my sisters, & except the same for yourself and all the children, from your Affectionate Husband;

James Peters.

It is my wish that you should be careful and not take any Bank notes unless W. Armstrong will take them at his own risk & have nothing to do with that note against Charles Crowther at present. If it is not done already get some straw to put on the Pits in the garden.

Addressed on outside: "William Hewitt, Esq., Guelph."

ERAMOSA, July 10th, 1838.

Dear Sir;

In compliance with your request I have endeavoured to state some facts on the subject of our conversation. But have purposely left the Congratulatory address to Lord Durham to your superiour judgment well knowing your abilities to compose it with a better grace and more formal manner than I am able to do, and have only to mention that no one entertains a higher opinion of His Lordships exalted character than myself. Should you find anything in this humble attempt to throw light on an unpleasant subject you are at liberty to cull it out. If there is nothing it is only my time lost. I regret that the busy time has prevented more attention to the composition of these hasty schetches requesting you to let me have these lines again at some convenient opportunity, by so doing you will much oblige.

Yours respectfully,

JAMES PETERS.

A statement of facts relative to the arrest of James Benham, Hiram Dowlan, John Butchart, Calvin Lyman, James Peters, William Armstrong, and James Parkinson. All inhabitants of the Township of Eramosa, in the District of Gore and Province of Upper Canada. And also short account of their Imprisonment and subsequent treatment previous to being brought to trial for High Treason, together with some facts respecting the

manner which Jeffrey Lynch, one of her Majesty's Justices of the Peace, insulted and extracted money from the pockets of the People of 60 or 70 of their Neighbours in the Township aforesaid (the exact amount which Jeffrey Lynched at that time I am not able to state being Boarding and Lodging at Her Majesty's expense in those days).

On the Night of the 13th. or the Morning of the 14th. of December, 1837, John Inglis, Esq., one of Her Majesty's Justices of the Peace, with a body of Armed Men amounting 30 or more, entered our dwelling Houses with fixed Bayonets and Arrested James Benham, Hiram Dowlan, Calvin Lymans, John Butchart, James Peters, William Armstrong and James Parkinson, and took them prisoners to Guelph where the said John Inglis, Esq., promised the Prisoners should have an examination. And he kept his promise with respect to William Armstrong, James Parkinson, Hiram Dowlan and Calvin Lyman, this formal examination took place before His Worship, in presence of Major Young, a leader of an Orange Lodge at Guelph, James Hodgert acting as Clerk on that occasion, said Hodgert also a leading Member of the same lodge, after some delay William Armstrong, Hiram Dowlan, James Parkinson and Calvin Lymans were admitted to Bail and James Benham, John Butchart and James Peters were committed to Gaol without any examination at all. And in my Humble opinion the said John Inglis and Co. Virtually suspended the Habeas Corpus Act in these Arbitrary proceedings 12 days before the House of Assembly met. Benham, Butchart and Peters were taken to Hamilton Gaol, and thrust into the Cells at midnight without either Bed or Blanket, one of the coldest nights ever experienced at that season of the year. They was kept in the Cells until 4 o'clock next day and then removed to the Debtors' Rooms, 3 weeks after James Peters was admitted to Bail in the sum of £250 and two sureties in one hundred pounds each and James Benham and John Butchart were kept 4 Weeks longer although great exertions were made to get them out on Bail, thus it will be seen that James Benham and John Butchart were kept 7 weeks in prison & James Peters 3 also besides 2 weeks each after the Grand Jury found true Bills against them, these three men each was torn from his distracted Wife two of which were left with 9 children each and the other with 5 for an alledged crime of which an Intelligent Jury after eight minutes consultation a part of which time must have been taken up in choosing their Foreman, pronounced them not Guilty.

I shall now proceed to mention one or two of the Causes that in my opinion has had a tendency to involve this Province in this deplorable situation, for if Lord Durham could get at the root of the evil, or find out the cause he would be better able to apply the remedy. It is well known though it was not susceptible of proof at the time, that undue influence was used by the Government to defeat the Reformers when Governor Head dissolved the late House of Assembly because they refused to grant supplies. Sir Francis succeed in his scheme and got such a house as he wanted but in an evil hour this most Intelligent (he said) nay this almost Immaculate House passed a law to violate the British Constitution by holding their seats in case of the demise of the King and for anything we know these same Members may at the coming Session pass another Law for them to keep their seats during their invaluable lives for they had as much right

by the Constitution to pass the latter as they had the former, and it does appear to me that this late attempt to overthrow one of the best features of our glorious Constitution has been the direct cause of sundry wicked Persons attempting to overturn it in another way, but mark the difference, those who were the first aggressors are loaded with fat offices while the others are stigmatized as a band of Rebels: it my opinion if the odious Law alluded to had not been passed Rebellion would not have raised its Hydra head in this Province for I am fully of opinion that this detestable act stands at the head of all our Grievances for by this and some other measures the Government party has done more to create disaffection and bring about a Revolution than all the Reformers put together previous to the passing the law alluded to.

The Clergy Reserve Question is another stumbling block in the way of the present House of Assembly for the quibbling underhand manner in which they have attempted to dispose of them will forever stand foremost amongst their sins of Commission. When the King and the Imperial Parliament granted these Reserves for the benefit of support of Protestant Clergy they do not so much even as hint that the Church of Rome is considered as having any claim to these valuable lands and their conduct in endeavouring to give a fifth part of them cannot be Justified nor excused.

I have a few observations to make Respecting the Legislative Council but must be very brief having already extended my remarks to an unreasonable length, but so far as I am acquainted with the sentiments of all Constitutional Reformers a reformation of some kind must begin here for so long as it remains as at present constituted we have no reason to hope for a better state of things for the House of Assembly may be composed of the Best men in the Province and pass the most Judicious Laws, yet they have the power and have always had the disposition to reject everything that seems to confer any priviledges on the people. I have something to say Respecting a responsible Executive Council but must defer it for want of Room.



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Volume XX.

Attorney-General, Thomas Scott

BY
HON. WM. RENWICK RIDDELL, LL.D., F.R.S.C.

THOMAS SCOTT,
THE SECOND ATTORNEY-GENERAL OF UPPER CANADA.
BY THE HONOURABLE WILLIAM RENWICK RIDDELL, LL.D., F.R.S.C., etc.,
Justice of the Supreme Court of Ontario.

FIRST PAPER.

Thomas Scott was the son of the Reverend Thomas Scott, a Minister of the Established Kirk of Scotland, and was born in 1746; he was educated for the ministry of the same church and was a "Probationer" waiting for a spiritual cure when he became tutor in the home of Sir John Riddell, the sixth Baronet of Riddell in Roxburghshire, Scotland.¹

Scott was advised by some friends to study for the Bar. He followed the example of very many of his countrymen and went south to seek his fortune. He took up his residence in London and was admitted of Lincoln's Inn in 1788.² After the usual term of study he was called to the Bar in Hilary Term 1793.

Nothing seems to be known of his career in England except that he probably had some experience in Chancery.⁴

When John White, the first Attorney-General of the Province of Upper Canada, died from wounds received in a duel with John Small, Clerk of the Executive Council, in January, 1800, the Lieutenant-Governor, Peter Hunter, wrote to the Duke of Portland informing him of the death of White and asked for the appointment of a qualified person in England, as there was none he could recommend in the Province for that important office.⁵

Nothing official appears of record to show for a certainty why Scott was appointed, but private letters are extant which make the reason fairly clear.

Hunter, after he had sent the despatch just mentioned, received a recommendation of Scott from Chief Justice Elmsley and Mr. Justice Allcock (Elmsley was of the Middle Temple, but Allcock was of Lincoln's Inn). Hunter at once wrote to the Duke of Portland and it was not long before Scott was appointed.⁶ He took passage by the *Buckwood* and arrived at Quebec, where Hunter then was, in November, 1800. It was too late to take the water route for Upper Canada, and moreover he was almost at once embroiled in a dispute with a Provincial Officer, Angus Macdonell, (afterwards drowned in the *Speedy* disaster), who had been Clerk of the House of Assembly at York—he was in Quebec in possession of the records of the House: Hunter directed him to deliver them up to Scott, and Macdonell quite properly refused. Scott threatened to take legal proceedings when he should arrive at York, but the threat was unavailing.

Scott remained in the Lower Province until the summer of 1801, and made a most favourable impression upon Hunter who was high in his praises. He arrived at York and was sworn in July 17, 1801.⁷

By this time the recalcitrant Clerk of the House had been dismissed, though as the House declared in a vote of 13 to 4 it was "the opinion of this House that Angus Macdonell, Esquire, hath faithfully performed his duty while he was Clerk of this House, and that he was not dismissed from his office for any irregularity in his conduct as Clerk;" and he was paid £125 currency for arrears of salary which possibly reconciled him to the defeat, by a division of 9 to 7, of a vote of thanks to him for his services while Clerk.⁸ He had himself become a member of the House at the General Election of August, 1800.

Scott proved himself a competent lawyer, cautious almost to timidity, always where possible avoiding conflict, but tenacious in matters of principle.

In his second year he took part in the squabble over the fees to be collected by the various officers for Patents of Land. A very acrimonious discussion took place between the officers entitled to fees. One very burning question was as to the fees to be charged for land grants to the United Empire Loyalists; and that was at length settled by the officers waiving all right to receive fees on patents for additional land to the Loyalists.⁹ Scott, like every other officer of the Province, was underpaid, and he applied to be paid the same fees as his fellow Attorney-General of the Lower Province, and his request was recommended for acceptance by the Executive Council;¹⁰ he did not fail to receive grants of land to which he was entitled.¹¹ In 1804 he was recommended by Hunter to be an Honorary Member of the Executive Council, owing to the absence of several of the Councillors; and, without waiting for the approval of the Secretary at Westminster, he was appointed to that position, August 18, 1804.¹² The reasons assigned for this step give some idea of how the Province was governed at that time. Hunter says that of the Executive Council, the Chief Justice, Allcock, was in England, Commodore Alexander Grant of the Marine of Lake Erie was of an advanced age, James Baby was at Sandwich, David William Smith had resigned, and only Peter Russell, Aeneas Shaw, and John McGill were available to make the quorum, and of these Shaw was indisposed, so that it was imperative to have at least one other Councillor appointed.¹³

Scott took an active part in the business of the Council: he was made one of the "Committee of the Executive Council,"¹⁴ which had practically the whole administration of the affairs of the Province; the Mandamus for his appointment as Honorary Member of the Council, i.e., member without pay, did not arrive until 1806.¹⁵

John Elmsley, the Chief Justice at Quebec, died there in July, and it was expected that the practice on the two previous occasions would be followed and the Chief Justice of Upper Canada, then Henry Allcock, would be promoted to the vacant position in Lower Canada, which carried a decidedly higher salary and was for other reasons much preferable. Scott had been told by the Home authorities, on his appointment as Attorney-General, that he would be in the way of advancement in his profession in Upper Canada, and he confidently relied upon

the influence of his friend, Lieutenant-Governor Peter Hunter, to promote his ambition to be appointed to the position to be vacated by Allcock. Hunter, however, died August 21, 1805, at Quebec. Commodore Alexander Grant who was indeed favourable to Scott, but who had little, if any, influence with the Colonial Office, had become Administrator and Scott was compelled to look to other means. He accordingly wrote to Camden urging his claims to the Chief Justiceship of Upper Canada.¹⁶

Opposition was not wanting; the newly arrived junior puisne Justice, Thomas Thorpe, an Irishman who thought he had the support of Castlereagh (that summer appointed by Pitt, Secretary of State for War and the Colonies) wrote to his friend Edward Cooke, that "now in Upper Canada there is no Governor, no General, no Bishop, no Chief Justice, the Council have made a President but from a kind of cabal amongst them . . . the President (Alexander Grant) . . . quite inefficient . . ." and not obscurely hinting at his own merits.¹⁷

Growing bolder, Thorpe, some weeks later, made a direct request of Castlereagh for the appointment of Chief Justice.¹⁸ Thorpe took part in the attack upon the Administrator made by Weekes, Willcocks and other malcontents which enlivened the times, and never became *persona grata* with Grant or any of the official class in Little York.¹⁹ Scott, on the other hand, was one of the "Scotch instruments" (McGill being the other) with which Hunter ruled and, as Thorpe thought, ruined the Province.²⁰

Thorpe continued his applications, hoped that "Lord Castlereagh will not be induced to place anyone over me on the Bench," and that nothing could induce him "to sting me to the heart by placing anyone over me," if such a thing were to happen "to remain would kill me;" he firmly believed that he would be Chief Justice, "for the Attorney-General is as incapable in his profession as he is injurious out of it;" he hoped that "the knowledge I have shown in my profession, the exertion I have made for the Government and the confidence the publick have of my ability and integrity will have its full weight with his Lordship."²¹

It is not at all impossible that in the circumstance of Castlereagh's sense of indebtedness to Thorpe for certain unnamed services, had he remained Secretary of State, Thorpe would have been appointed. But Pitt died in January, 1806, Castlereagh resigned, giving place to William Windham and Thorpe's chance dwindled to zero.²² Scott was appointed Chief Justice of Upper Canada and was sworn in August 14, 1806, a few days before the arrival in York of the new Lieutenant-Governor, Francis Gore.²³

It is now time to turn back and say something of Scott's career at our Bar. There is no formal entry on the Minutes of Convocation of Scott's Admission and Call to the Bar of Upper Canada, but the lists show that he was admitted and called in Hilary Term, 1801: he had the right under the Law Society Act of 1797, as Attorney-General, to be a Member of the Law Society of Upper Canada, and a Benchers as well.

The first entry of his attendance as Benchers is Hilary Term, 1803: thereafter the meetings of the Bench were held at his office and he was a constant attendant: in Trinity Term, 1803, he gave notice that he would, at the next

meeting, propose John Robert Small as a Student at Law and in the Michaelmas Term he did so. Small being articled to him, and Small was admitted as of date of his articles. Easter Term, 1805, Scott became Treasurer of the Law Society; and his last act as Benchet was, March 5, 1806, to move that D'Arcy Boulton, the Solicitor-General should succeed him as Treasurer.

Scott was an efficient Attorney-General: as was then, and for long afterwards, the custom in this Province, he prosecuted for the Crown on some of the Circuits, the Solicitor-General taking the remainder; and it was only when neither officer could conveniently attend the assizes that outside counsel was retained.²⁴ His accounts are still of record, but none of them discloses any case out of the ordinary, but one, and that is sufficiently interesting to be gone into in some detail.

William Jarvis, the Provincial Secretary, was the officer to whom were paid the fees imposed by Provincial Statute for Liquor and Tavern Licenses; the Province then was most niggardly in its allowances to public servants and the Imperial salary was wretchedly insufficient: the fees received by the Provincial Secretary did not suffice to support his family, and he detained some of the money that belonged to the Province. Scott as Attorney-General took action against him and recovered judgment for £1,145.4.5d., upon which a Writ of Extent was issued and placed in the hands of Alexander Macdonell, Sheriff for the Home District, for the sum of £118.13.5½. The Sheriff seized Jarvis's goods for this amount under the Writ of Extent. Macdonell resigned the Shrievalty; Joseph Willcocks succeeded him, and he received another Writ of Extent for £692.7.1½, and seized under it. Jarvis represented the harshness of the proceeding to Hunter, and Hunter agreed that the deficit might be paid out of Jarvis's fees and allowances, Jarvis agreeing in the meantime to be content with his salaries as Registrar and Secretary. The amounts due were made up in this way and paid to Peter Russell, the Receiver-General: whereupon Russell and the Attorney-General directed Willcocks to go out of possession. Both he and Macdonell demanded their poundage on the abandoned seizure, but the demand was not complied with. Willcocks then applied for and obtained a Rule upon Russell and Scott for the poundage on this Writ of Extent. The rule was made absolute (Macdonell abandoning any right he might have to any part of the poundage on that writ) and Willcocks was ordered to be paid, the Rule Absolute running "that the poundage and extra costs to be paid to Joseph Willcocks, Esquire, the present Sheriff, the late Sheriff Alexander McDonell having in Court relinquished any claim he may have to any part thereof." Then Macdonell applied for and obtained, a Rule for his poundage: this Rule also was made absolute and his poundage ordered to be paid.²⁵ Scott paid the amounts but as the trouble arose from the inadvertence of the Governor, it was later on paid out of the money at the disposal of the Government.²⁶

One would have thought that Jarvis would be more than satisfied, but he brought an action against Scott for £5,000 damages for irregularity in the issue of the Writ of Extent: this action however, was arranged without proceeding to trial.²⁷

Scott's career after his elevation to the Bench will be treated in a subsequent paper.

Hipple. _____
Rothburg
Morpeth
Sept 12/74

Dear Sir

My Brother, General Riddell has forwarded a letter from you of 7th inst. asking for information as to the late Chief Justice Scott of Toronto or of Andrew Meuer.

I am sorry to say that I can supply none whatever, except that nearly 100 years ago Mr. Scott was travelling Tutor to my Father and his two elder Brothers, who both died young and was through my Fathers life his intimate Friend & correspondent. My Father died in 1817, and after my Mothers death in 1860 I turned all the letters I found from Canada but have no recollection of the name of Meuer in them. I never heard anything of C.J. Scott's original domicile or lineage. Messrs Mylne & Campbell 21 Queen Street, Edinburgh represent my Fathers Solicitors, & have lately been investigating his affairs, with a view to the division among Creditors of a sum which fell in on my Mothers death. I know C.J. Scott was a Creditor to a small amount, & Messrs M. & C. may possibly know something of his History. I am sorry I cannot further assist you & remain (your Brother lawyer) &

Yours Sincerely
(Sir) Walter B. Riddell

C. Gamble Esq^r Q.C.

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29 St. Andrew Square.

Edinburgh 15th Sep. 1874

Dear Sir

Mercer's Succession

I enclose a letter from Sir Walter Riddell to you received there this morning, and which I opened and perused as arranged. - I fear our only chance of expiscating the matter will be by enquiries at & near Riddell; and I shall endeavour to overtake there before you leave for Toronto. I have not yet had any reply from the Ministers at Kingoldrum & Meigle. It seems to me that you might ask Sir W. Riddell to instruct Mr. Mylne to exhibit to me the various papers produced in the 'Ranking' and which are certain to throw some light on the matter.

I trust that you arrived safely and found your family well & I am,

Dear Sir,

Sincerely yours

John Welsh

Clark Gamble Esq Q.C.

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HONOURABLE
MR JUSTICE MOWAT

OSGOODE HALL
TORONTO

My own branch of the Riddell family (the Farncliffe and Farncliffe branches) was closely allied with the Scotts, my grandfather, Francis Scott Riddell, being named after a member of the Scott family.

It is said by Head in his "Lives of the Judges," p. 82, that Scott began "study in the family of Sir Walter Riddell, whose name is famous at the Law Courts in Edinburgh." It was through the advice and influence of Sir Walter Riddell that he was induced to leave Scotland for London, where he studied for the law at Lincoln's Inn.

It is just possible that Scott was a tutor, as a young man, in the family of Sir Walter Riddell, the Fifth Baronet, but Sir Walter died in 1765, when Scott was only nineteen and could scarcely have been a probationer. The family tradition is more in accord with probability, that is, that it was the family of Sir John Riddell, the Sixth Baronet, who succeeded his father Sir Walter in 1765, that Scott entered as a tutor. Sir John had by his wife, Jane, daughter and heiress of James Buchanan, of Sunden, Bedford County, three sons: Walter, James Buchanan, and John Buchanan, each of whom became Baronet in succession. With the last named, Scott is known to have been familiar, and he made the children of Sir John Buchanan Riddell (other than the heir, Sir Walter Buchanan Riddell) his residuary legatees.

There was no Sir Walter Riddell, an Advocate. There was a not very remote kinsman, John Riddell, an Advocate (admitted December 16, 1821), a lawyer of some note; but John Riddell "the greatest Scottish historical antiquary and peerage lawyer of the 19th century"—see "Dyce's Peerage," etc.—was not born till 1787; he was a "Scotch cousin."

In Lockhart's "Memoirs of the Life of Sir Walter Scott, Bart.," Edinburgh, Robert Cadell, 1845, John Riddell is mentioned, p. 382, October 9, 1818. Sir Walter speaking of the friends scattered in Scotland, said, "of which who knows anything to the purpose except Tom Thomson and John Riddell."

It is not possible that John Riddell had any influence on Scott, nor is there any certainty that any of the Riddells did induce him to study law. I have not been able to discover Scott's birthplace; probably it was somewhere in Berwickshire, see Note 2.

It may be of interest to extract from Lockhart's work, some account of Sir Walter Scott's relations with Sir John Buchanan Riddell. It appears from p. 399, that May, 1819, at "an election . . . in consequence of the death of Sir John Riddell, of Riddell, Member of Parliament for the Selkirk District of Burghs," Sir Walter was electorizing some distance from "Whiggish eyes." He joined Lockhart, not far from the village of Lilliesleaf, part of the ancient domain of Riddell of that ilk and "rode all around the ancient woods of Riddell." Lockhart says: "Many were his lamentations over the catastrophe which had just befallen them. 'They are,' he said, 'one of the most venerable races in the south of Scotland. They were here long before these glens had ever heard the name of stables or beagles—in my walking of Humeburgh, they can show a Pope's Bull of the tenth century, authorizing the then Riddell to marry a relation within the forbidden degrees. Here they have been for a thousand years at least, and now all the inheritance is to pass away, merely because one good worthy gentleman would not be contented to enjoy his horses, his hounds, and his bottle of scotch like thirty or forty predecessors, but must needs turn scientific agriculturist, take almost all his fair estate into his own hands, superintend for himself perhaps a hundred ploughs and ten acres new mown that has been tumbled by the quackish improvers of the time. And what makes the thing ten times more wonderful is that he kept day-book and ledger and all the rest of it as accurately as if he had been a cheesemonger in the Grassmarket."

Lockhart writing after Scott's own financial ruin from mixing in the speculating business says: "Some of the most remarkable circumstances in Scott's own subsequent life have made me often recall this conversation, with more wonder than he expressed about the ruin of the Riddells." See notes after chapter. 17th death of Thomas Riddell, younger, of Camiston, "a very good fellow" is noted by Sir Walter, April 20, 1826, p. 621).

The Under Treasurer of Lincoln's Inn informs me that the only entries in the Books of the Inn are "Thomas Scott, Esq., of Co. Berwick, admitted — May 1788, called to the Bar, Hilary, 1793."

It is said by Mr. D. R. Reid, Q.C. in his "Life of Scott, 'The Lives of the Judges of Upper Canada and Ontario,'" Toronto, 1888, pp. 82, 83, that Scott received a Commission with others from Lord Dorchester in 1788 to enquire into the nature and

quality of the confiscated Jesuit estates in the Province of Quebec, and this is repeated in Doughty and McArthur's "Constitutional Documents, 1792-1818," Archives Report (1914) p. 425, N. 2. This is a mistake, the Thomas Scott there named was a different person.

⁴ Lieutenant-Governor Peter Hunter in his despatch to the Duke of Portland, York, August 1, 1801, Can. Arch. Q. 270, I, 88-92, excepts Scott from his general charge against the Bar of Upper Canada of ignorance of law in general, "and as to a Court of Equity, I believe not one of them was even within the walls of such a jurisdiction."

⁵ Hunter to Portland, from Quebec, February 10, 1800, Can. Arch. Q. 286, II, 106. "Mr. Gray, the Solicitor-General being a very young man and not as yet possessing sufficient professional knowledge and there being no person in either of the Canadas who(m) I could recommend as well qualified to fill that station, I must, therefore, rely on Your Grace sending out as soon as possible a Gentleman sufficiently qualified in all respects to fill that important office." Hunter had asked Robert Isaac Dey Gray, the Solicitor General, to take over the duties of the office of Attorney-General in the meantime.

⁶ In the Canadian Archives at Ottawa are preserved the letters of Hunter to the Heads of Departments. Amongst them (p. 42) is one to Chief Justice Elmsley, "Before I received your and Mr. Allcock's recommendation of John (sic) Scott, Esquire, of Lincoln's Inn, I had written to the Duke of Portland to send out a Gentleman sufficiently qualified in all respects to succeed the late Attorney-General . . . As it may not yet be too late, I will embrace the first opportunity of writing to His Grace and mention Mr. Scott to him as a Gentleman strongly recommended to me by yourself and Mr. Allcock as perfectly qualified for the office of Attorney-General of Upper Canada."

Quebec Oct. 13

Writing from Kingston, May 12, 1800, to Elmsley, Hunter says (p. 64): "Mr. Scott has taken his passage on the ~~Buckwood~~ . . . daily expected to arrive. We have been very fortunate in getting such a man for our Attorney-General."

Again writing to Elmsley from Quebec, November 28, 1800, Hunter says (p. 74): "The ~~Buckwood~~ arrived at Quebec a few days ago and brought the Attorney-General of Upper Canada. As soon as the roads permit, he will repair to York."

Writing to Allcock from Quebec, December 14, 1800, Hunter says (p. 77) that Scott will set out in February for Upper Canada; he also says that Angus Macdonell, Clerk of the House of Assembly had declined to deliver over to the Attorney-General the Journals and other papers belonging to the House of Assembly and that the Attorney-General had promised to take the necessary legal steps for the recovery of the same as soon as he reached York.

Family tradition has it that the appointment was due to his friend, Sir John Buchanan Riddell (the 9th Baronet) who had married the daughter of the Earl of Romney and granddaughter of the Earl of Egremont who had been Secretary of State for the Southern Department; Sir John was member for Selkirk, Lanark, etc., and a firm supporter of the Government, which needed support, be it said. He, was *persona grata* in the official circle; and personal influence was more effective than anything else.

Scott looked upon Sir John as a close friend and made his children (except the eldest) residuary legatees by his will made in 1821 after Sir John's death in 1819.

Portland's despatch to Hunter is dated from Whitehall, July 24, 1800, Can. Arch. Q. 278A, 209, do. do., G. 53 II p. 398, and reads: "His Majesty has been pleased to appoint Thomas Scott, Esquire, of Lincoln's Inn, to be His Majesty's Attorney-General of Upper Canada in the room of Mr. White. The favourable representations made to me of the character and professional abilities of Mr. Scott give me every reason to expect that he will do credit to the appointment." Hunter expressed his thankfulness for the appointment in a despatch to Portland from Quebec, October 21, 1800, Can. Arch. Q. 289, II, 537.

¹⁰ Minutes Council, August 4, 1806, Can. Arch. Q. 308, II, 250.

295, 13. He gave an official opinion on the same day, do. do., 13.

¹¹ See Proceedings of House of Assembly for Upper Canada, June 17, 19, 29 and July 3, 1801, 6 Ont. Arch. Rep. (1909) 204, 210, 225, 226, 235.

¹² See the agreement, dated July 17, 1802 signed by Peter Russell, Auditor-General, David William Smith, Surveyor-General, Thomas Scott, Attorney-General and John Small, Clerk of Executive Council, Can. Arch., Q. 298, I, 25.

¹³ December 30, 1802, Can. Arch. Q. 298, I, 55, 58.

¹⁴ Can. Arch. Q. 298, II, 209, 555.

¹²Despatch, Hunter to Lord Hobart, Secretary of State for War and the Colonies, who had taken over the office from Dundas, March 17, 1804, (that office took over the Colonies in 1801) despatch dated from York, U.C., May 16, 1804, Can. Arch. Q. 238, I, 2; See Order in Council, Can. Arch. Q. 299, 321.

¹³Hunter to Lord Camden (who had succeeded Hobart, May 12, 1804, and retained the position until replaced by Castlereagh, July 10, 1805). The despatch is dated from York, April 10, 1805, Can. Arch. Q. 300, 226. Shaw resigned, April 29, 1805, and Hunter asked Camden to appoint McGill (who was an Honorary Member of the Council without pay) to the vacancy which carried a salary of £100 sterling per annum, Can. Arch. Q. 300, 228, Hunter to Camden, York, May 7, 1805.

¹⁴May 24, 1805, Can. Arch. Q. 308, I, 68. Scott and John McGill were appointed to "examine the council books," do, do.

¹⁵Minutes Council, August 4, 1806, Can. Arch. Q. 308, II, 250.

¹⁶Writing to Camden from York, U.C., September 29, 1805, Scott says that when the Duke of Portland appointed him Attorney General of Upper Canada in 1800, he told him through John King, the Under Secretary, "that I might in the Department of Law in this part of His Majesty's Dominions consider myself in the list of preferment next to Mr. Allcock, Chief Justice of this Province and of that signification . . . there are documents deposited in Your Lordship's office." He referred to the great loss to the Province through the death of the "late Lieutenant Governor Hunter, my much lamented Protector and Friend," and asked that if Allcock succeeded Elmsley he might succeed Allcock, Can. Arch. Q. 303, 155. It was apparently not known in the Colony that (July 10, 1805) Viscount Castlereagh had displaced Camden.

¹⁷Can. Arch. Q. 303, 177, letter Thorpe to Cooke, York, October 1, 1805. He had been lucky, however, in being removed from Prince Edward Island for "the worst people in the world" are there, a "set of miscreants . . . I blessed you for sending me away"; and feared that these miscreants would give more trouble than the Island was worth. Later he called the Administrator "an enfeebled, old, ignorant, Methodist preacher."

¹⁸Can. Arch. Q. 303, 206, Thorpe to Castlereagh, York, November 21, 1805.

¹⁹See the article "Mr. Justice Thorpe" 40, Canadian Law Times, (November, 1920) pp. 907, sqq.

²⁰Letter Thorpe to Cooke, York, U.C., January 24, 1806, Can. Arch. Q. 305, 86.

²¹Can. Arch. Q. 303, 86, 90, 103.

²²Windham succeeded Castlereagh, February 14, 1806. (Castlereagh was considered responsible for the abortive Elbe expedition in 1805 and gave up office to Windham whom he again succeeded, March 25, 1807, as a member of Portland's administration).

²³Gore received notice from Windham to proceed to Upper Canada in March, 1806; he arrived in the Province, August 2, at York, August 23, and took over the Government August 25, 1806. Thorpe "stung to the heart by those in office from whom I had the strongest expressions of regard" did not cease his attacks on Scott: "a being has been put over my head and made Chief Justice who has neither talent, learning, nerve nor manner and also from being despicable in the mind of the people can have no weight with Juries and consequently will reduce the Bench to insignificance." Thorpe to Sir George Shea, Permanent Under Secretary, Niagara, Upper Canada, October 22, 1806, Can. Arch. Q. 305, 173.

²⁴The late Sir Glenholme Falconbridge, my beloved Chief in the King's Bench Division, (*valde defensus*), told me that John Sandfield Macdonald, when Attorney General West, (1862-1864), was known to have conducted criminal prosecutions in person. I have not been able to verify my Lord's recollection; in any case, it is not known that Sandfield Macdonald conducted prosecutions when Attorney General of Ontario (1867-1871).

²⁵The rule in favour of Willcocks was moved by William Weekes, July 11, 1806, Trinity Term, 46 Geo. III, and made absolute July 14; the rule in favour of Macdonell was moved by Weekes and made absolute July 18. See the Term Book for that Term now in the Ontario Archives. Copies of the Rules and order are to be found in Can. Arch. Q. 308, II, 239, 240; do, do, Q. 313, 113, 114.

²⁶By the Act (1716) 3 George I, c. 15, s. 3 (Imp.) the sheriff was entitled to poundage on a Writ of Extent to the amount of 1s 6d in the pound for the first £100 and 1s in the pound for the remainder; hence Willcocks' poundage was £37 2s; the bailiff, Joseph B. Cox, was in possession from April 9, 1803, to October 19, 1804, but Mr. Jarvis made him an allowance for services done in his office during the time so as to afford him a full compensation if 1s a day should be paid by the sheriff. Willcocks paid Cox £27 18s, so that his whole bill against Scott and Russell was £45,

at which sum it was taxed and allowed by William Warren Baldwin, acting Clerk of the Crown, July 30, 1806. On the same day a warrant issued to Scott for the repayment to him of £65 Halifax Currency, paid by him to Willcocks, Can. Arch. Q. 308, 241.

²⁷See Gore's despatch to Windham, York, October 1, 1806, Can. Arch. Q. 305, 45; Willcocks got £79 11s 2½d currency and costs.

In the Term Book for July 19, 1806, is found the first entry concerning the action *Jarvis v. Scott*. D'Arcy Boulton, the Solicitor General, obtained leave from the Court (Powell and Thorpe JJ.) to "plead double," and on the consent of William Weekes, for the plaintiff, the defendant was allowed one month from that day to plead. On the same day, Boulton obtained leave to strike a special jury in the action. Scott took the oaths of office and his seat in the Court of King's Bench at the beginning of Michaelmas Term, Monday, November 3, 1806, and November 11, Scott, C.J., and Thorpe, J., admitted William Dickson (who had killed Weekes in a duel at Fort Niagara) to be attorney for the plaintiff in Weekes' stead; the waspish Weekes being dead, there was no difficulty in settling the action out of Court.

SECOND PAPER.

Ten days before he was sworn in as Chief Justice, Scott presented his *Mandamus* as Honorary Member of the Executive Council; August 14, 1806, he presented his *Mandamus* as Ordinary Member as well as his Commission as Chief Justice, and was sworn in at a meeting on that day of the Executive Council.¹ As was the custom, he at once became President of the Council, which position he retained as long as his health permitted.

All the Chief Justices of the Province down to and including Sir John Beverley Robinson, were Presidents of the Council. Robinson resigned January 25, 1831, at the instance of the Home Administration, since which time there has been no Judge in the Executive Council in this Province: at the time of Scott and for a score of years thereafter, the position was considered, and sometimes even in official documents erroneously styled, *ex officio*.²

Scott also received a summons to attend the Legislative Council as a member as well as a Commissioner under the Great Seal from the new Lieutenant Governor, Francis Gore, as Speaker of that House.³ This also was in accord with the custom which prevailed in the Province until the time of the Union of 1840-41.⁴

He suffered much from ill health⁵; he was not pushing or ambitious, and he took little or no part in directing the policy of the Government; he was diligent in his judicial duties and in attendance at the Executive Council, but was inclined to shirk detail.

In March, 1808, the news arrived at York of the death of Chief Justice Allcock in Lower Canada. Scott, when he was appointed Attorney-General of Upper Canada, had been informed by John King, Under Secretary, that he might expect the Chief Justiceship of Upper Canada and then that of Lower Canada when vacancies should occur; the position in Lower Canada was "superior in emolument," but Scott could not express himself in French with any degree of propriety, he was unacquainted with the laws of Lower Canada, and thought himself too old to learn; and he accordingly determined to retain his position in Upper Canada.⁶ In this year (1808), he was furiously assailed for his decision in a case of great note in its day, which it is worth while stating in some detail.

In 1795, a "Register Office" was provided for each County and Riding with an officer called a "Register" who should vacate his office by "death, forfeiture, or

surrender," no other cause being named in the Statute. David McGreggor Rogers, a Member of the House of Assembly, was appointed "Register" for Northumberland and Durham, at Hamilton (now Cobourg). He took part in the House in a somewhat factious opposition to the Government, and Gore determined to remove him; he consequently appointed Thomas Ward to the office. Rogers refused to give up the books, and William Firth, the Attorney-General, moved for a mandamus to compel him to do so, relying upon the wording of Rogers' Commission "during pleasure." Rogers contended that this limitation was illegal and inoperative; and the Court, Scott, C. J. and Powell, J. so decided. Both Attorney-General Firth and Solicitor-General Boulton openly expressed their indignation at the decision, and Scott was abused as ignorant and incompetent, but the law officers of the Crown in England agreed with the Colonial Court.⁷

Gore had already become dissatisfied with the want of energy exhibited by Scott in the Councils, particularly in the Legislative Council. Almost from the very beginning of the separate Provincial life of Upper Canada, the Lower House had shown itself democratic and desirous of measures of reform which the Governors opposed; and the Governor relied most upon the Legislative Council to defeat such measures. Powell, the senior puisne Judge of the Court of King's Bench, recommended himself to Gore by his vigour and his uncompromising Toryism; and we find Gore asking for Powell's appointment (with others) to the Legislative Council "to give that body its proper weight and influence." This was acceded to and a direction was given for the appointment of Powell with Col. Thomas Talbot and Captain William Clars to the Council.⁸ Powell was appointed an Ordinary instead of an Honorary Member of the Executive Council. April 12, 1809, but Scott was left to bear the burden in the Legislative Council alone.¹⁰

During the troubled time of Mr. Justice Thorpe's opposition to the Government, Scott conducted himself with great moderation, not to say timidity; he consequently escaped much public obloquy which his more active and aggressive confrère Powell experienced. Of course Thorpe vilified him in his letters to his friends at Westminster, but Scott was spared the sight of these unworthy documents.

The story of the next trouble which the Chief Justice got into is as interesting as it is amusing; it was in connection with Robert Nicol, a man of great, even brilliant, attainments and considerable oratorical power. From the earliest times, the highways of the Province had been in a deplorable state; the Legislature had placed the care of them partly in the Municipalities and partly in the Justices of the Peace; but money was lacking, the rates imposed and the duties required by law were wholly insufficient to the necessities of the case. Accordingly in 1804, 1806, 1808, 1809 and 1810, the Legislature granted sums—large for the country and the times—to repair and amend roads, lay out new roads, etc. Except for the year 1806, in which money was intrusted to the Magistrates, Commissioners were appointed by the Lieutenant-Governor to see to the application of it.¹¹

The Act of 1810 allotted £300 to the District of London to be applied on a road particularly named in the Statute. Robert Nichol was gazetted a Commissioner for that District. He resided at the Village of Dover in the Township of Woodhouse, thirty miles from the nearest part of the road and nearly one hundred and fifty from the western extremity, and he considered that he was not called upon to act, there being two other Commissioners resident on the road. He refused at first to interfere in the matter at all. The other Commissioners informed him that they had not received the money: it was arranged that he should go to York and get it and that they would have the work done on the road. He received the money in October: he went to Oxford to pay the labourers but was taken ill. He then paid Mr. Yeigh, one of the other Commissioners, £150.0.3 for Mr. Springer the other Commissioner, and a certain amount for Mr. Yeigh himself. He did not, however, have the expenditure of the money properly vouched as he should have done, nor did he receive proper vouchers from Yeigh and Springer.

When the House met early in 1811, there was some discussion as to the manner in which the Road Commissioners throughout the Province had performed their duties, and a Select Committee was appointed to examine their accounts. The Committee reported *inter alia*: "They have received no account from Robert Nichol of the application of £300 appropriated for the year 1810, and remains to be accounted for by him £300." The Committee finding £1,865.4.7 not accounted for by Commissioners expressed regret "that more zeal and exertion and more rigid economy has not been exhibited to effect the beneficial intentions of the Legislature."

The House resolved itself into a Committee to take into consideration this report and passed resolutions condemnatory of some of the Commissioners: amongst other things it was "Resolved that it is in the opinion of this Committee that the Commissioners of Highways for the London District have abused their office by the misapplication of the moneys committed to their care and that three hundred pounds rests in the hands of Mr. R. Nichols, a Commissioner, no part of which appears to have been applied to public uses."¹²

Parliament was prorogued two days thereafter. As soon as the news of the reflection upon his conduct reached Nichol, he transmitted his accounts to the Secretary of the Lieutenant-Governor with a full narrative of the particular circumstances. He concluded a long letter by saying: "Experience has . . . convinced me that no integrity of heart nor rectitude of conduct are a defence against malevolence and detraction: and that actions the most upright and disinterested are to be sacrificed and party purposes are to be gained . . . there is no foundation for the insinuation against me in the resolution . . . I have not benefited either directly or indirectly by one shilling of the public money."

The House met early in February, 1812: and a copy of this letter was, February 19, delivered at the Bar of the House: being read the following day, it was by a vote of 12 to 6 resolved "that Robert Nichol has been guilty of a breach of the privileges of this House by making a false, malicious and scandalous representation to the person administering the Government relative to the proceedings

of this House . . ." The Speaker was directed to issue his warrant to the Sergeant at Arms to apprehend him and bring him before the House to answer for his contempt and he did so.

Stephen Jarvis, the Deputy Sergeant-at-Arms (who acted during this Parliament for William Stanton, the Sergeant-at-Arms) arrested Nichol and brought him to the Bar of the House. He was heard in his defence and the House decided by a vote of 13 to 9 that he had "been guilty of a breach of privilege in addition to his former offence in denying that this House have the privilege of committing an offender who by them has been found guilty of a breach of privilege." The Speaker by a vote of 12 to 10 was directed to issue his warrant to the Sheriff for commitment of Nichol to the Common Gaol of the Home District, and he did so. John Beikie, the Sheriff of the Home District received Nichol into the gaol at York. Nichol at once applied for a writ of *Habeas Corpus* under the Statute of 31 Charles II, "a prerogative writ of right;" this Scott granted as he needs must; the prisoner was brought up and the warrant of committal examined. It was seen to be general, the offence being stated "the said Robert Nichol having been convicted of a breach of the privilege of the Commons House of Assembly." The Chief Justice had no option but to discharge him; and he was discharged.

The House, being informed of the facts by the Sheriff, resolved by a vote of 12 to 9 that the Hon. Thomas Scott, Chief Justice of this Province has been guilty of a violent breach of the privileges of this House by discharging from . . . Gaol . . . the body of Robert Nichol . . . ;" and a message to that effect was sent to the Legislative Council, where Scott was sitting as Speaker. The Chief Justice thought proper to enter into an explanation of his conduct; and gave a clear account of the law and practice, showing that the proceedings before him had been legal, regular and proper in every respect.

The Legislative Council resolved itself into a Committee of the whole to take the message from the Assembly into consideration, and resolved (while disclaiming any right to interfere with the Chief Justice in his judicial functions) to enter the explanation of the Chief Justice in its Journals and to send a copy to the Assembly. The Assembly resolved by a vote of 11 to 9 to send a Petition to the Prince Regent (George III was insane); complaining of "an alarming, dangerous and unjustifiable violation of the privileges of the Commons of this Province . . . lately . . . made by the Honourable Thomas Scott, His Majesty's Chief Justice in as much as he liberated Mr. Robert Nichol . . . committed by them for a high contempt and breach of their privileges . . . an interference on the part of the judicial authority we cannot too much deprecate." The Address as engrossed was carried by a vote of 12 to 8. It was sent to General (afterwards Sir) Isaac Brock then administering the Government in the absence of Gore in England, coupled, however, with the assurance that the House had "the highest opinion of the integrity and good intentions of the . . . Chief Justice" and sincere regret that "he has been, as we apprehend, so badly advised as to interfere with the privileges of the Commons."¹³

Within a week of the Prorogation of Parliament, Brock transmitted to Lord Liverpool the Address of the House with a full report of the whole proceedings and Scott's explanation.¹⁴ He also sent to Sir George Prevost, the Governor-in-Chief at Quebec, a full and detailed account showing that the censure passed by the House upon the Chief Justice was wholly unjustifiable.¹⁵ Scott's conduct was approved by the Home Government.

In the year 1812 was passed the Act, 52 George III, c. 9, which amended the previous Act of 1808, 48 George III, c. 10, and provided better and more effective relief for the Heirs and Devises of Nominees of the Crown in cases in which patents had not been issued for lands to which such Nominees would have been entitled had they lived. Scott was, March 7, 1812, appointed on the Commission to carry the provisions of the Statutes into effect: much valuable and onerous work was done by him and his associates, and great benefit inured from their labours.¹⁶

War was declared by the United States in June, 1812, and the energies of all Canadians were called upon for war.

The Chief Justice was too old to take up arms, but he was active in the organization of the Loyal and Patriotic Society of Upper Canada, formed at York in 1812 with the object of relief to militiamen and their families, rewarding merit, etc. In matters relating to carrying on the war, however, he was much less active and useful in advising the Administrators than his puisne, William Dummer Powell, not much younger but very much more pushing and willing to accept responsibility.

When York was taken by the U.S. forces in April, 1813, the Chief Justice with Powell and others went to General Dearborn with a request, which the General granted, that civil magistrates of the city should retain their authority over their own people. Scott did full justice to the humane desires and honourable conduct of the U.S. General.¹⁷

In the following year, 1814, he and the other Judges of the Court of King's Bench received a Special Commission of Oyer and Terminer and Gaol Delivery to try those accused of High Treason in the Home, London and Niagara Districts. The Court sat at Ancaster, beginning May 23, and adjourning June 21, 1814, the Judges taking the trials on alternative days, and John Beverley Robinson, the young Acting Attorney-General, prosecuting for the Crown.¹⁸ Fourteen were convicted and one pleaded guilty, of whom eight were executed, July, 1814.¹⁹

After the war and in 1815, the Chief Justice joined the other two Judges of the King's Bench in advising against a Patent of King's Counsel issuing to Christopher Alexander Hagerman.²⁰ Gore returned to the Province as Lieutenant-Governor in September, 1815, and stated that he had received instructions to remove the Seat of Government from York to Kingston. Scott acting with practically all the official class wrote strongly against the proposition,²¹ and finally it was abandoned.

Scott strongly desired to be allowed to retire from public life altogether; he complained of infirmity incident to old age: he was three score and ten, and men grew old sooner in those days. The Lieutenant-Governor, Gore, was quite

as anxious as Scott for his retirement, he wished to advance Powell upon whose activity and ability he could rely. Financial considerations prevented a pension, such as Scott desired being allowed: all salaries and pensions of the judges were still paid by the Mother Country, but an arrangement was made whereby Scott was relieved of the Speakership of the Legislative Council.²²

In the Session of 1816, for the first time in the history of the Province, the Legislature granted a sum of money—£2,500—toward defraying the expenses of the civil administration of government of the Province, such expenses having been theretofore paid by an appropriation of the Imperial Parliament, aided in case of need by the military chest at Quebec.²³ The grant relieved the financial situation, and Gore was enabled to urge upon the Home Administration, the pensioning of Scott at £800 per annum, two-thirds his salary as Chief Justice,²⁴ and Scott was at last permitted to resign his Chief Justiceship.

Before the long Session of the Provincial Parliament closed, as it did April 1, 1816, it paid a high tribute to Scott. As soon as it was known that he had resigned from his Speakership, Nichol, who was an exceedingly active and influential member of the Assembly, began to agitate the propriety of the Assembly doing something to atone for the rather shabby treatment by the preceding Assembly of the Chief Justice in 1812: he had such success that on March 29, he was able to obtain unanimous consent to dispense with the Rules of the House so far as to enable him to move Resolutions that the "House entertaining a just sense of the urbanity and conciliation which uniformly guided the late venerable Speaker of the Honourable the Legislative Council, as well in the discharge of the several important duties of that high station as in private life, are desirous of evincing the same by a public testimonial;" that he should be given £500 "as a testimonial of the respect entertained for him by the House" and an engraved copy of the Resolutions sent to him. The Resolutions were carried *unm. con.*: the Legislative Council concurred: and the Chief Justice received £500 and the copy of the Resolutions.²⁵

Scott continued to reside at York during the short remainder of his life. He had a house and grounds forming the block bounded by Front, Yonge, Wellington (then Market) and Scott Streets (Scott Street being named after him), the house built by him facing on Front Street with the garden, orchard and pleasure grounds to the north and east.²⁶

There he lived, retired from public life, loved and esteemed by all who knew him, until his death, July 28, 1824: he was buried in the Churchyard of St. James, but his body was removed to St. James' Cemetery, October 14, 1852, where it lies in a triangular plot adjoining Block D, Hillside, to the north.

A tablet was erected to his memory by sorrowing friends bearing the inscription²⁷

"Sacred to the memory of
Thomas Scott
late Chief Justice of this Province
who departed this life, July 28,
1824
at the advanced age of 78.

This amiable man will be long kindly remembered for the sweetness of disposition, a suavity of manners as a companion, his uprightness as a Judge, his amiable and endearing qualities as a friend, and his Charity and Truth as a Christian man."

Scott is described by one who saw him frequently as below the average in height with a heavy overhanging brow, which intensified the thoughtful expression of his countenance.²⁸ That he was a man of fine culture all admitted; and it was perhaps owing to his weak state of health that he did not make his mark in the history of our Province.²⁹

¹See Minutes of Executive Council for August 4, 1806, Can. Arch. Q. 308, 250: August 14, do. do., 263, 265, 267. The date, August 6, 1806, given for Scott's taking the oath of office in the introduction to Robinson and Joseph's Digest, Vol. 1, is incorrect.

²The resignation of Sir John Beverley Robinson and its causes are fully discussed in my paper, "Judges in the Executive Council of Upper Canada," 20 Michigan Law Journal, May, 1922, pp. 716-736. The reform was part of the constitutional changes sought by William Lyon Mackenzie and the Radicals; the "Canada Committee" of the House of Commons at Westminster reported against the practice in 1828, but the reform was delayed. Mudge, the Governor's Secretary, in transmitting Robinson's resignation, speaks of the position as *ex officio*. Can. Arch. State L, p. 481; see also do. do., G. 66, p. 261, and the paper mentioned in this note *supra*. Major General C. W. Robinson makes the same mistake in his "Life of Sir John Beverley Robinson," at p. 200.

³At the opening of the Session in 1807, he produced his Writ of Summons to attend the Legislative Council and also his Commission as Speaker; York, February 2, 1807, 7 Ont. Arch. Rep. (1910) p. 275.

⁴All the Chief Justices had been Speakers of the Legislative Council from the beginning, and continued to be such till and including Chief Justice Robinson. When Scott was disabled by sickness shortly before his resignation in 1816, Mr. Justice William Dummer Powell, (who was to succeed him as Chief Justice) was appointed Speaker. When Robinson was absent in England, (1838), Mr. Justice Jonas Jones was appointed Speaker. After the Union, for some time Vice-Chancellor Robert Symptom Jameson was Speaker of the Legislative Council of Canada, but since his resignation, November 6, 1843, no judge has been a member of the Legislative Council. See my articles "Judges in the Parliament of Upper Canada," 3 Minnesota Law Review, (February and March, 1919), pp. 163, 244.

⁵There are fugitive references to his ill-health before he went on the Bench, e.g., Lt.-Col. (afterwards Sir) Isaac Brock, writing to Lieut.-General Hunter from York, August 2, 1803, says: "The Attorney General, I am sorry to say, continues very unwell; he has adopted a plan which I think will be of service to him. He has already been embarked two days in the Toronto. He accompanies The Chief Justice (Allcock) this evening to Niagara, whence, I understand, he proceeds to Kingston." Can. Arch. C. 922, pp. 89, 90. Brock was at that time Lieutenant Colonel of the 49th Regiment; Hunter was the Lieutenant Governor. Nearly everybody in York was full of malaria, caused by mosquito-bites, and nearly everybody ate too much and drank too much, bringing on premature old age. *Nous n'avons pas changé tout cela.*

⁶See Scott's letter to Gore from York, March 26, 1808, Can. Arch. Q. 311, p. 57. John King was Permanent Under-Secretary of State for the Home Department from 1782 till 1806; he gave the promise to Scott on the instruction of the Duke of Portland, Home Secretary, 1794-1801. (The Home Office did not transfer the Colonies to the War Department till 1801). On Scott's expression of desire to remain in Upper Canada, William Firth, who had succeeded him as Attorney General of Upper Canada in 1807, applied for the position in Lower Canada, (Can. Arch. Q. 311, p. 124) but without success, as Jonathan Sewell was appointed. See Can. Arch. Q. 311, pp. 65, 133, 134.

⁷Statute (1795) 35 Geo. III, c. 5, ss. 1, 3, 10, U.C., not repealed till (1846) 9 Vict. 34, s. 1, (Can.). Mandamus Nisi, November 8, 1808, argued January 4, 1809, reargued July 10, 1809, Judgment, July 15, 1809, King's Bench, Term Books; Can. Arch. Q. 313, pp. 498, 499, 527, 518: do. do., Q. 312, pp. 151, 153.

The law officers at Westminster were Attorney General Sir Vicary (afterwards Chief Justice) Gibbs, and Solicitor General Sir Thomas Pomer (afterwards Attorney General, in 1813 appointed the first Vice Chancellor of England, and, according to Sir Samuel Romilly, "a worse appointment . . . could hardly have been made"). The opinion of the Law Officers is dated from Lincoln's Inn, March 15, 1810, and it will repay perusal. Can. Arch. Q. 313, II, p. 518. There can be no doubt as to the law. The same law officers were of opinion adverse to Firth's contention in a matter of Fiats affecting him adversely from a pecuniary point of view. See Can. Arch. Q. 314, p. 238.

⁹Despatch, Gore to Lord Castlereagh from York, U.C., March 20, 1809, Can. Arch. Q. 312, p. 34, "the Legislative Council . . . has too frequently the unpleasant and unpopular task of resisting measures brought forward in the House of Assembly which are inexpedient. In order to give to this body which forms so useful a counterfoil to the Rashness of the House of Assembly its proper Weight and Influence, it is necessary that it should be strengthened by the addition of some new members"; and he recommended "William Dummer Powell, Esq., one of the Justices of His Majesty's Court of King's Bench in this Province, a Gentleman who has discharged the Duties of that important Office with Probity and Honour for upwards of twenty years and whose local knowledge particularly fits him for such a situation." Gore also recommended Col. Thomas Talbot and William Claus, Deputy Superintendent-General of Indian Affairs. Powell was already a member of the Executive Council, September 14, 1808. Can. Arch. Q. 314, p. 447. I cannot refrain from copying here part of a letter written by Scott to Gore, July 25, 1809: "Philip VanKoughnet of a meritorious Loyalist" had "petitioned for Lot 15, S. side of Water Street in the Town of Cornwall." He was only nineteen years old so could not be granted the Town Lot. The Committee of the Executive Council, through Scott, recommended reserving the Lot for him till he came of age "as conferring a particular favour on the son of an old soldier." Can. Arch. Sundries, U.C. 1809. This was Mr. (afterwards) Colonel Philip VanKoughnet who became Member for Stormont at the General Election of 1820, and three years later the father of Philip Michael Matthew Scott VanKoughnet, second Chancellor of Upper Canada. We need not ask where he got his name "Scott."

¹⁰Despatch, Castlereagh to Gore, from Downing Street, September 8, 1809, Can. Arch. Q. 312, p. 38.

¹¹William Claus produced his summons for the Legislative Council and was sworn in, February 3, 1812; he became of the Executive Council, June, 1816; Powell in the Legislative Council, June 7, 1819, (Scott being still a Member but suffering from ill-health). Powell was appointed an Ordinary instead of an Honorary (and unpaid) member of the Executive Council at a Council Meeting at the Queen's Palace, April 12, 1809. Can. Arch. Q. 312, II, p. 363.

¹²The Legislation is (1793) 33 Geo. III. c. 2, 4, (U.C.); (1794) 34 Geo. III. c. 9, (U.C.); (1798) 38 Geo. III. c. 7, (U.C.); (1804) 44 Geo. III. c. 6, (U.C.) £1,000; (1806) 46 Geo. III. c. 4, (U.C.) £1,500; (1808) 48 Geo. III. c. 2, (U.C.) £1,600; (1809) 49 Geo. III. c. 9, (U.C.) £1,600; and (1810) 50 Geo. III. c. 2, (U.C.) £2,000.

¹³Journals, Ho. of Assy. U.C., for 1811, 8 Ont. Arch. Rep. (1911) pp. 456-8, 470, 477. The Select Committee was composed of Thomas B. Gough of the East Riding of York and Simcoe; Matthew Elliott, of Essex; David Secord, of the second Riding of Lincoln; J. B. Baby, of Essex, and Capt. Thomas Fraser, of Glenarry. The Committee of the Whole was under the Chairmanship of Phillip Sovereign of Norfolk: it presented its Report March 11, 1811. Nichol was a man of good business capacity; he had flour and saw mills, a distillery and other valuable property at Dover, and was a very busy man. See his Petition to Lord Bathurst for reimbursement for his property destroyed in the war of 1812 to the amount of £6,200. Can. Arch. Q. 318, II, p. 360.

¹⁴Journals, Ho. of Assy. U.C. for 1812, 9 Ont. Arch. Rep. (1912) pp. 39-41, (Nichol's letter to Halton, the Governor's Secretary; 43 (first division); 54, 57 (second division); 58 (third division and warrant of committal); 69 (return of Sheriff, Writ of *Habeas Corpus*, return and discharge); 70 (fourth division); 78, 79 (Nichol refused copy of proceedings by a vote of 14 to 8); 82 and 83 (address to Prince Regent and sixth division); 85 (seventh division); 87 (Address to Brock); 91 (£25 paid to Sergeant at Arms for time and expense in arresting Nichol and £10 to John Burk for taking the Sergeant at Arms in a sleigh to Long Point); 94 in the Legislative Council. Journals of Leg. Col., U.C., 7 Ont. Arch. Rep. (1910), pp. 425, 426. From an analysis of the votes on the seven divisions it appears that the following voted consistently throughout against Nichol:

1. Abraham Marsh, Stormont and Russell, 7 votes.
2. Willet Casey, Lennox and Addington, 7 votes.
3. John Willson, West Riding of York, 7 votes.
4. John Stinson, Prince Edward, 7 votes.
5. Benajah Mallory, Oxford and Middlesex, 7 votes.
6. Thomas B. Gough, East Riding York and Simcoe, 7 votes.
7. Peter Howard, Leeds, 7 votes.
8. Joseph Willcocks, First Riding Lincoln and Haldimand, 7 votes.
9. Philip Sovereign, Norfolk, 7 votes.
10. David McGregor Rogers, Northumberland and Durham, 7 votes.
11. Thomas Dorland, Lennox and Addington, 6 votes.

For Nichol:

12. Thomas Fraser, Glengarry, 7 votes.
 13. John McGregor, Kent, 7 votes.
 14. Matthew Elliott, Essex, 7 votes.
 15. James McNabb, Hastings and Ameliasburgh, 6 votes.
 16. Stephen Burritt, Grenville, 6 votes.
 17. Levi Lewis, First Lincoln and Haldimand, 6 votes.
 18. Allan McLean, Frontenac, 6 votes.
 19. Crowell Willson, Fourth Lincoln, 5 votes.
 20. David Secord, Second Lincoln, voted 6 times against and once for.
 21. Henry Marsh, Dundas, voted 3 times against and twice for.
 22. Thomas Mears, Prescott, voted twice against and 3 times for.
 23. Alexander Macdonell, Glengarry, was excused from attendance.
 24. J. B. Baby, Essex, was absent, and 25. Samuel Street, Third Lincoln, was Speaker.
- Twenty-five members were provided for by the Representation Act of (1808), 48 Geo. III, c. 11 (U.C.)

¹⁴Despatch, Brock to Lord Liverpool (who was Secretary of State for War and Colonies from October 11, 1809, till June 11, 1812), York, March 23, 1812, Can. Arch. Q. 312, pp. 39-69. The despatch credits a Committee of the Executive Council with the original report against Nichol and gives a report of this Committee, February 28, 1812, made after Nichol's release on *Habeas Corpus*. see do. do., pp. 41, 66. Scott's account of the whole episode will also be found in Can. Arch. Q. 316, p. 281.

¹⁵Despatches, Brock to Prevost, from York, April 22, 1812, Can. Arch. c 676, pp. 103, 107. Nichol brought an action for false imprisonment against Stephen Jarvis, the Acting Sergeant-at-Arms; Jarvis retained Dr. William Warren Baldwin and paid him 50 guineas as "retaining and counsel fees" which he asked the House to reimburse him. February 26, 1814, Journals Ho. of Assembly, U.C., 9 Ont. Arch. Rep. (1912) pp. 120, 121. Baldwin obtained from the Court of King's Bench, leave, Monday, April 13, 1812, for two months time to plead and also to plead double, Not Guilty and a special justification on the Speaker's Warrant. See King's Bench Term Book, Easter Term, 52 Geo. III. The war coming on, it is probable the case was settled; at all events there is no further record of it: and it does not appear that Jarvis got his 50 guineas back.

Nichol also sued Samuel Street, the Speaker of the House, for false imprisonment. Street wrote from Willoughby, April 10, 1812, (Can. Arch. Sundries, U.C., 1812), with the Declaration and Writ to John Brock, General Isaac Brock's Secretary, and "presumes that he will instruct the Attorney General to defend and also a similar action against the Deputy Sergeant-at-Arms." I can find no entry of this action in the Term Book; nor can I find any further reference to it in any contemporary or other document; it was probably dropped when the more serious business of war came on.

Nichol sought vindication from the electors of Norfolk, (Sovereign left the District and came to the Home District to reside), and at the General Election of 1812 was returned to the House. He was an active and useful member. During the war he served with honour receiving a commission as Lieutenant-Colonel and being highly thought of. He was killed in 1824 by driving off the cliff on the road between Stamford and Queenston in a violent storm. In the House he advocated reforms and was a useful and active member, and a brilliant speaker.

¹⁶See Can. Arch., Sundries, U.C., March 7, 1812; also records of the Heir and Devisee Commission at Osgoode Hall.

The Commissioners were Scott, C.J., Powell and Campbell, JJ., of the Court of King's Bench, Hons. James Baby, Alexander Grant, John McGill and Prideaux Selby (Members of the Executive Council) and Alexander Wood, J.P., of York. The Judges took the burden of the investigation, as was to be expected,

¹⁰See letter of T. G. Ridout, Kingston, May 5, 1813, Can. Arch. c. 678, p. 188. Read's "Lives of the Judges," Toronto, 1888, pp. 32, 33, 67.

¹¹On John Macdonell being killed at the battle of Queenston Heights, October 12, D'Arcy Boulton, the Solicitor General, would naturally have been made Attorney General; but he was a prisoner of war in France; and Robinson (though not yet called to the Bar) was appointed Acting Attorney General. When Boulton was released and came home, late in 1814, he became Attorney General and Robinson, Solicitor General.

¹²The story of the "Bloody Assize at Ancaster," I have already told. Many particulars can be found in Can. Arch. Q. 318, pp. 124, sqq., see esp. Scott's admirable letter, do. do., pp. 132, 137; the names of those executed, do. do., p. 141. The series Can. Arch. Sundries, U.C. for 1814, has many letters, etc., on these trials, from June to September, 1814.

¹³See my article "The First and Futile Attempt to Create a King's Counsel in Upper Canada," 40 Canadian Law Times (February, 1920) pp. 92 sqq.; the Report is printed, pp. 97, 98.

¹⁴See for example Scott's letter to Sir George Murray (afterwards in 1828, Secretary of State for War and Colonies) from York, September 30, 1815, Can. Arch. Q. 321, p. 34. See Rev. Dr. Strachan's letter to Murray, York, October 3, 1812, Can. Arch. ... 321, pp. 40, 52.

¹⁵The Journals of the Legislative Council, U.C., for 1816 are not extant; from the Journals, Ho. Assy., U.C., 1816, 9 Ont. Arch. Rep. (1912), pp. 273, sqq., it appears that Scott's last message to the House as Speaker of the Council was March 23, and Powell's first was March 25, 1816, March 24 being a Sunday. His resignation was dated March 21 and alleged as a reason "The length and fatigue of this Session," with the labours attending the discharge of his other duties, "old age calls upon me to retire." Can. Arch. Q. 320, p. 195. Scott to Gore.

Powell was not in good circumstances, and Gore had to make financial arrangements for him, the particulars of which appear in a letter from Gore to Lord Bathurst (Secretary of State for War and Colonies, 1812-1827), York, U.C., April 29, 1816, Can. Arch. Q. 320, p. 191. "Mr. Scott's age and infirmities . . . obliged him to resign the Chair of the Legislative Council. I was constrained to call Mr. Justice Powell to it by Commission, but as I could not reasonably expect that he should meet the expense of a Table which custom had imposed upon that situation, I engaged to provide a salary of £400 a year which the Assembly had unanimously voted but which for circumstances connected with public interest, as well as the personal feelings of that Gentleman, was not accepted." This salary was paid by the House Administration, Can. Arch. Q. 322, p. 113. Scott's formal application to be allowed to retire on a pension was sent by Gore to Bathurst, May 22, 1815, Can. Arch. Q. 319, p. 103; his Memorial is at p. 106.

¹⁶This Act (1816) 56 George III, c. 26, U.C., has not received the attention which it deserves. Upper Canada thereby made her first real step toward responsible Government, not to reach the goal till more than twenty years thereafter.

¹⁷Despatch, Gore to Bathurst, from York, U.C., April 29, 1816, Can. Arch. Q. 320, p. 191: "The chief obstacle to Chief Justice Scott's wish to retire on a pension" being removed.

Later on in the same year, November 11, 1816, Gore recommended Rev. Dr. Strachan to succeed Scott in the Executive Council. Can. Arch. Q. 320, p. 168; and he was appointed July 24, 1817, Can. Arch. Q. 323, p. 13, at a meeting of the Privy Council held at Carlton House; Strachan had been made an Honorary Member under Order in Council, June 2, 1815, Can. Arch. Q. 319, p. 262.

¹⁸See for the resolutions, 9 Ont. Arch. Rep. (1912) pp. 297, 298; concurrence of the Council, 299; proposed joint address, p. 300; Committee, p. 301; Governor's cordial assent, p. 302; thanks of Scott, p. 303.

¹⁹This house was originally a long one-storey frame building, but a second storey was afterwards added; it was occupied later by Mr. Justice Sherwood; in my time, the American Hotel, succeeded by the Board of Trade Building, occupied the site Scott also built a long, low cottage in Scott Street. See Robertson's "Landmarks of Toronto" Vol. 1, p. 309; Scadding's "Toronto of Old," p. 376.

²⁰From information furnished me by Mr. Gray, Superintendent of St. James' Cemetery, the tablet is about 2 feet 6 inches high and is upon six marble posts. Mr. Read has made several errors in the copy given by him of the inscription, "Lives of the Judges," p. 72.

Notwithstanding his early training and chosen profession, Scott became a member of the Church of England, having a pew in St. James. All the Chief Justices of the Province before Archibald McLean, 1862, who was a Presbyterian, belonged to the Church of England, as did most of the officials.

"The Reverend Dr. Scadding, "Toronto of Old," p. 51.

"I cannot find that he was ever married; and it is certain that he left no near relatives in Canada. He had one brother, William, who lived at Meigle in Angus, Scotland, (about twenty miles N.E. of Perth). His will is on record in Toronto; it reads as follows:

In the name of God, Amen— I, Thomas Scott, late Chief Justice of the Province of Upper Canada, being of sound mind and in good health of body yet ignorant how long these blessings may be indulged me, do make this my last Will and Testament in manner & form following:

First, I direct that all my just and lawful debts be immediately paid. Next that all the residue of my property real and personal be subject to the payment of an annuity of one hundred pounds sterling to my Brother William Scott now living at Meigle in the County of Angus, North Britain, to be paid to him half yearly earnestly requesting my Executors hereafter named to take particular care that the said annuity be regularly paid and applied in such a manner as may be deemed most conducive to my Brother's comfort. In order to secure the aforementioned annuity I give full liberty and power to my Executors to sell, alienate and dispose of all my estate, real and personal, or otherwise make the same available at their discretion so that the sum of one hundred pounds may be regularly paid from the proceeds of the same in half yearly payments for the use of my said Brother.

I give and bequeath to the Reverend James Hadaw, vicar of Streatley, Bedfordshire, England, the sum of three hundred pounds sterling to be divided among his children as he shall judge proper. Provided nevertheless that the said three hundred pounds Sterling shall not be so paid to the said Reverend James Hadaw till after the death of my Brother, should my Executors apprehend that paying the same earlier would be attended with any difficulty in continuing to him (my Brother) the aforesaid annuity.

I give and bequeath to my Servant, Bradshaw McMurray, the sum of sixty pounds Currency provided he be with me at my decease.

I constitute and appoint the children of my friend the late Sir John Riddell of Riddell with the exception of his eldest Son or Heir my residuary Legatees among whom after the death of my Brother and the payment of the legacies mentioned in this Will I direct and ordain that all my remaining Property real and personal may be equally divided and I do hereby constitute and appoint William Allan, Esquire, of York, and the Reverend John Strachan, Rector of the same place, Executors of this my last Will and Testament.

To my friend William Allan, Esquire, I give and bequeath as a mark of my esteem the sum of fifty pounds sterling.

I give and bequeath to the Law Society my eight volumes of manuscript Precedents, and to the Reverend John Strachan such volumes of books to be chosen by himself out of my Library as he may wish.

I beg Mr. McGill's Mr. Baby's acceptance of a plain Mourning Ring as a memorial of our long Friendship.

In witness whereof I have hereunto set my hand and seal this twentieth day of June, one thousand eight hundred and twenty-one.

"Thos. Scott" (seal)

Signed, sealed, published and declared by the said Thomas Scott the Testator as his last Will and Testament in the presence of us who in his presence and at his request and in the presence of each other have signed our names as witnesses hereto:

"R. G. Anderson"

"John Cartwright"

"A. Chewett"

On this seventh day of May one thousand eight hundred and twenty-three I add as a codicil my will and desire that forty pounds currency be added to the sum bequeathed in the former part of this last Will and Testament to my servant Bradshaw McMurray, provided my Executors think from his attention to me that he deserves the same.

"Thos. Scott"

Witnesses to this Codicil:

"J. Baby"

"John Strachan"

"W. Allan"

ADDENDUM.

After Scott's death there was a current report that he had lost heavily by the financial failure of his close friend, Sir John Buchanan Riddell, Baronet of Riddell. Chief Justice Powell in a letter from York, July 30, 1824, to Gore, then in England, tells of the death of Chief Justice Scott with "no relation or closer connection in this Province than his former Consorts in office," and adds "It is supposed that he sustained great loss by the death of Sir John Riddell, insolvent." (Powell MSS. in my possession). The will is an answer to this suggestion.

What happened was that Scott placed some of his salary in the hands of Sir John, who was then laying the foundations of financial ruin by experimental and scientific agriculture. See Lockhart's "Memoirs of the Life of Sir Walter Scott, Bart." Edinburgh, Robert Cadell, 1845, at p. 399. Scott laments that "one good worthy gentleman would not be contented to enjoy his horses, his hounds and his bottle of claret like thirty or forty predecessors, but must needs turn scientific agriculturist, take almost all his fair estate into his own hands, superintend for himself, perhaps a hundred ploughs, &c. &c." Sir John died in April, 1819; the family estate which had been in the family from the 12th century had to be sold, and Sir Walter, the succeeding Baronet, went to London where he became a County Court Judge. *Quantum mutatus ab illo.*

In Can. Arch., Q. 318, pp. 460-2, is correspondence from Sir John in connection with Scott's salary, June 26, 1814; see also Can. Arch., Q. 321, p. 71, April 4, 1816.

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The Ancaster "Bloody Assize" of 1814

BY
HON. WM. RENWICK RIDDELL, LL.D., F.R.S.C.

THE ANCASTER "BLOODY ASSIZE" OF 1814.

BY THE HONOURABLE WILLIAM RENWICK RIDDELL, LL.D., F.R.S.C., etc.

Justice of the Supreme Court of Ontario.

The war of 1812-15 produced in the Province of Upper Canada many interesting results: one of the most interesting from a legal point of view was the Session of the Court of Special Oyer and Terminer and Gaol Delivery holden at Ancaster in May and June, 1814, for the trial of certain inhabitants of the Province for the highest crime known to the law, High Treason.¹

We Canadians are rather given to vaunting the loyalty of our people; but it must be admitted that while the vast majority of Canadians in 1812, on the declaration of war and invasion of the Province, took their stand unflinchingly under the Old Flag, there were some in almost every section of the Province who were traitors—some openly joined the invading forces, some made their way across the lakes or boundary rivers to the United States.

It is not intended in this paper to discuss the question generally, but rather to deal with the prisoners who were called to stand at the Bar for trial at the Ancaster Special Court of Oyer and Terminer, sometimes in later days called the "Bloody Assize."

Abraham Marcet² was at the General Election of 1812 elected to the House of Assembly to represent Haldimand County and Saltfleet, Ancaster, etc., in the Sixth Parliament of Upper Canada. He was one of those settlers in the Province who had been attracted from the United States by the offer of free land: notwithstanding his protestations it is reasonably certain that he was never loyal to British connection and that he was one of the original "hyphenates." On the outbreak of hostilities, he was suspected of disloyalty by reason of his previous conduct in word and deed: he was arrested on suspicion and the British squadron cruising on Lake Erie in June and July, 1813, took him a prisoner to Kingston, whence he was sent to Sir George Prevost, the Governor-General in Lower Canada. There, protesting his loyalty, he was, after a few days detention, given his freedom to return to his farm, but only on the assurance that he would demean himself as a loyal and peaceable subject, that he would appear before the Chief Justice and other members of the Executive Council at York and enter into such recognizances as should be required for his good behaviour.³

The next heard of him was late on in the same year, when, it is said, he joined himself with some other Canadians to a small detachment of the enemy's forces under the command of Lieutenant Larwell, which was proceeding from

near the Thames to Long Point, Lake Erie. He acted as their guide, if not their instigator:⁴ and, as the Norfolk Militia had been disbanded, the marauders had an easy prey.

But Henry Medcalf, a lieutenant of the Norfolk militia, got together three sergeants and seven men of his old regiment, marched in the depth of winter (December 16) to Port Talbot, sixty-five miles away, where he was joined by two officers, one sergeant and seven men of the Middlesex militia, and a sergeant and six troopers of Coleman's Dragoons. The little army marched to Chatham, increasing there the force by a lieutenant and eight men of the Kent militia: and, hearing that the enemy's detachment and rebels were fortifying themselves in the house of one Macrae, they left behind their sick and exhausted, and the remaining twenty-eight proceeded against the improvised fort. Sergeant McQueen of the 2nd Norfolk Militia smashed in the door with the butt end of his musket, and in a short struggle the loyal Canadians killed two and captured forty, two making their escape, one of them being the traitor Marle.⁵ Among the prisoners were about fifteen inhabitants of the Province.

All the prisoners who were inhabitants of Canada were sent down to York Gaol by Lieutenant Medcalf and Colonel Bostwick,⁶ his superior officer. Bostwick also sent down others charged with treason. Of course those from the United States were held as prisoners of war; they were not traitors. Some of these prisoners, on February 7, 1814, made a representation to the Governor that they had been taken by militia squads under command of Colonel Henry Baustwick about December 1, that they had been confined ever since, that they had families of small children in the County of Norfolk, and they asked for a trial if they were charged with crime, offering to furnish bail if the alleged offences were bailable.⁷ The appeal was in vain.

The responsible law officers of the Crown at that time were John Beverley Robinson, Acting Attorney-General, and D'Arcy Boulton, Solicitor-General:⁸ but Boulton was a prisoner in France, and the whole burden of the prosecution of the criminal law fell upon the shoulders of the young Attorney-General.

The representation of these prisoners was submitted to Robinson, then, be it remembered, not yet twenty-three years of age. Against one man⁹ he had, indeed, no charge: but, thought that he was "a person by no means proper to be set at large"—he was an alien taken under very suspicious circumstances and sent down in December, 1813, by Colonel Bostwick with some others from the District of London under a military guard to Major Glegg at Burlington: and by Glegg sent to York, where he was committed to gaol under General Procter's orders. He was to be kept a prisoner of war. The rest were under charge of treason, a non-bailable offence, and would be tried at the proper time. The Court of King's Bench was busy in Term and no other Court could, without a Commission, try Treason.¹⁰ That Court might have a trial at Bar with all the Judges present on the Bench, but that practice had its disadvantages, and the usual course was to issue a Commission to certain persons, including a Judge or Judges of the King's Bench, authorizing those named in the Commission to try criminal cases. The two kinds of Commission were technically known as Commissions of Oyer and Terminer,

and Commissions of Gaol Delivery. The former enabled the Commissioners to try all cases in which the prisoners were found before themselves, the latter to try every one found in the prison they were to deliver, and each kind had its two varieties, general and special—special for offences or offenders named, and general for all offenders. While originally the two Commissions were distinct, by this time they were in practice contained in one document¹¹ and the Judge “going Circuit” carried it and held the “Criminal Assizes.” The practice of issuing such Commissions has ceased for nearly three quarters of a century in this Province, but the power still exists in the Crown to issue one in case of need.

It was thought best to issue a Special Commission of Oyer and Terminer to the three Justices of the Court of King’s Bench: Chief Justice Thomas Scott, and Puisne Justices, William Dummer Powell and William Campbell. Other names were added in the Commission, but they were merely formal. Some of them might sit on the Bench, but they took no real part in the trial, as the Judges conducted the proceedings without reference to their “Associates.”¹²

Then as to the place of trial. At the Common Law all persons, charged with crime, must be tried in the Shire or County where the alleged crime was committed, but the Statute of (1541) 33 Henry VIII, c. 23, enabled a trial for High Treason to be had in any County. And the Parliament of Upper Canada supplemented this measure by one still more simple, drastic and effective in the month of March, 1814, so as to put beyond all doubt the right of a Court of Oyer and Terminer sitting anywhere to try such offences committed anywhere in the Province. It was decided to have the trials at Ancaster¹³, then a place of considerable importance, but now lost in the shadow of its near neighbour, Hamilton.

Robinson consulted the Judges and they agreed that after the close of their Easter Term, they would take the cases whenever he was ready; and he quickened his movements, “for I shall enjoy very little rest or comfort until these prosecutions are ended”: he sent a competent junior, a member of the Bar, to Niagara, to make all necessary research at that place.¹⁴ Then he made enquiry for a Court House, and at length “the large house at Ancaster (the Union Hotel)” was secured. It was at the time in the possession of the military as a hospital, but the General agreed to give it up temporarily as a Court House¹⁵. Provision was made for food, etc., for the jurymen, witnesses, etc.; that the military could see to from their adjoining posts on Burlington Heights; but Robinson had troubles which the military could not relieve him of. The regular Clerk at Niagara, Ralfe Clench, had been taken prisoner, and John Small was appointed Clerk of the Court. He was not a lawyer, and while he could, and did, perform well enough his regular duties as Clerk of the Executive Council, he was out of his depth as Clerk of a Court of Oyer and Terminer. Robinson writes “Are Small’s Subpoenas printed yet? I have more trouble looking after other peoples’ business than my own. You have no idea of the difficulty of carrying on a public prosecution here. At home, everyone has his particular branch of duty assigned him, and he is able and willing to do it. Here every person stands in his place like a chessman waiting to

be shoved. I have to look into every step of the proceedings in every department, for if anybody commit an error, the effect as it regards the prosecution may be fatal."¹⁶

All being ready,¹⁷ the "Commission Day," i.e., the first day of the Sittings upon which the Commission was opened and read, was fixed for Monday, May 23, 1814: and special precautions were taken against the escape of any prisoner in case the enemy were to make an attack upon the place.

At first, it had been intended that only fifteen prisoners should be tried,¹⁸ but four more names were added to the list: jurors and witnesses were subpoenaed and everything made ready for May 23. In addition to those in custody it was intended that Indictments for Treason should be found against many others in order that they might be outlawed and their property forfeited to the Crown.

Most of those in custody had been taken by Medcalf on the occasion already mentioned.

On May 23, the Court opened at Ancaster, the Commission was opened and read, and, as was the custom then and for some decades thereafter, the Court then adjourned. On the following days, Bills for High Treason were found in rapid succession against the nineteen accused persons in custody, and also against about fifty who had not been apprehended. A Copy of the Indictment against him with a list of the witnesses to be produced and of the jurors impanelled, was then delivered to each of the accused in custody, in the presence of two witnesses: and the Court adjourned until Monday, June 7. The reason of this proceeding is historical. All right-thinking England had been disgusted and horrified at the brutality and unfairness shown in trials for High Treason in the Stewart period. Anyone accused of High Treason was considered as a kind of mad dog to be hunted down and destroyed by fair means or by foul.¹⁹ In 1695, a Statute was passed by the Parliament of England, that of 7 Will. III. c. 3, which provided that one accused of High Treason should, at least five days before his trial, (this was interpreted as meaning five days before his arraignment), have a copy of the indictment against him (but not the names of the witnesses). After the union of England and Scotland, the British Parliament passed an Act, (1708), 7 Anne, c. 21, which provided that ten days before trial the accused must have delivered to him in the presence of two witnesses, a copy of the indictment with a list of the witnesses to be produced, and of the jurors impanelled with their professions and places of abode. This provision was not changed so far as cases of High Treason in taking up arms against the Crown are concerned by the Amending Act of 1766 (6 Geo. III, c. 53).

These provisions were scrupulously observed, hence the necessity of the Court adjourning for a time.

The Judges of the Court of King's Bench arranged to preside over the Court of Oyer and Terminer in rotation, and on Monday, June 7, Chief Justice Thomas Scott took his place on the Bench.

The first to be arraigned was Luther McNeal, whose trial occupied the whole Court day; he was acquitted, and the Court rose.

On Tuesday morning, the Bench was occupied by the Senior Puisne Justice, William Dummer Powell. Powell was of a different stamp from Scott. Scott was an amiable mediocrity without political ambition, and desirous only of being let alone; he imposed his personality on no one. Powell was of great learning, ambitious of power and he dominated everyone he could, resenting the opposition of those who resisted. He was the real "power behind the throne" at this time and at other periods of our history.

Jacob Overholtzer (or Overholser) was placed to the Bar, an elderly man, who had but a few years ago come from the United States. He had foolishly or heedlessly joined the enemy in arms, and could not possibly escape the verdict of Guilty.

Then Mr. Justice Campbell, the Junior Puisne Justice, replaced Powell, and Robert Loundsberry was arraigned; he was acquitted, and the Court adjourned for that day. Campbell was not a strong judge; he seldom pressed for a conviction, but when a conviction had been secured, he was generally ruthless and seldom recommended commutation.

Wednesday, June 9, the Chief Justice again presided. Aaron Stevens was called upon to plead; Stevens was a man of good reputation and standing in the community, and had actually been in the service of the Crown in the Indian Department. He confessed to acting as a spy for the enemy and was promptly convicted.

Then Mr. Justice Powell replaced the Chief Justice, and Garrett (or Garratt) Neill was arraigned. He also was a recent immigrant from the United States; he had made "prisoners of the King's subjects in the London District to give them to the enemy" and he was found Guilty.

Thursday, June 10, brought Mr. Justice Campbell to the Bench, and John Johnston (or Johnson) to the prisoners' dock. He had been one of those in open and active rebellion in the London District, was one of Medcalf's prisoners and could not escape conviction.

On the same day before the Chief Justice, Samuel Hartwell and Stephen Hartwell were tried. They were young men lately from the United States, who had on the outbreak of the war gone back to their native land, joined General Hull at Detroit, and were taken prisoner by Brock at that place; brought back to Canada, they were paroled by mistake. The overt acts in their case were attempts to take prisoner His Majesty's loyal subjects to deliver them over to the enemy. Guilty.

The next day, Friday, June 11, before Mr. Justice Powell came Dayton (or Daton) Lindsey (Lyndsay, Lindsay, Linsey). He was a ringleader; he had openly joined the forces of the invader and had seduced others from their allegiance. He was convicted. Mr. Justice Powell finished out the day, and George Peacock, Jr., whose case was in almost every particular the same as Lindsey's, shared Lindsey's fate.

On Wednesday, June 15, Mr. Justice Campbell took his seat on the Bench, and Isaiah (Campbell calls him Jonah) Brink was set to the Bar. He had been in open rebellion, had joined the marauding party of the enemy, and had acted in a most atrocious way toward the loyal subjects. He was found guilty in a very

short time. The same day Benjamin Simmons (or Simmonds) faced the Chief Justice and a jury. He had also been one of those who joined the enemy and helped to ravage their neighbours: he had been taken by Medcalf and had no chance of acquittal. Guilty.

The evening and the morning session exhausted that day: and Thursday, June 16 Mr. Justice Powell again presided. Robert Troup was tried: he seems to have been innocent, and, though some of his conduct had been suspicious if not equivocal, he was acquitted after a short trial.

In the afternoon, Campbell relieved Powell, and Adam Crysler (Chrystler) was brought before the Court. He was also one of Medcalf's prisoners: his conduct was even worse than that of his comrades and he was convicted.

Friday, June 17, Isaac Petit (Pettit) was placed in the dock before the Chief Justice. It was made to appear from the evidence that Petit had taken some part with the marauders, but he had refused to accompany them and had been branded as a coward: the case, however, was clear, and he was justly found guilty. The same day, Jesse Holly was tried before Mr. Justice Powell and acquitted. The Court sat on Saturday, June 18, when, before Mr. Justice Campbell, Cornelius Howey pleaded Guilty.

Monday, June 20, saw Mr. Justice Campbell again on the Bench: John Dunham was arraigned and the evidence proved him a ringleader. Guilty. The following day, June 21, Noah Pyne Hopkins was proved before the Chief Justice and the jury, to have been the enemy's commissary and to have taken flour for their troops. He was found Guilty.

The list of prisoners was now exhausted: fourteen had been convicted on evidence, one had pleaded guilty, and four had been acquitted. For the unhappy fourteen, the law provided only one penalty:²⁰ the hideous execution for High Treason had not been modified by legislation from the earliest times: that sentence was pronounced upon all on Tuesday, June 21. It then became the duty of the Sheriff to carry out the sentence on Thursday, unless the Judges should grant a respite.²¹ The Judges had already met and had agreed that the sentences should be respited until July 20, to give all an equal opportunity of supplicating the Royal mercy, and that a report should be made to the President by the Chief Justice.²²

The report is extant²³: of those tried before the Chief Justice, the Hartwells who had surrendered voluntarily for trial, were recommended to mercy: for the time being, none of those tried before Powell was so recommended, and of those tried before Campbell, the Chief Justice says "Mr. Justice Campbell sees no circumstances of mitigation in the cases of those convicted before him unless the reluctance to continue with the party which Johnson appeared latterly to show and the wish expressed of leaving them, and the confession and apparent penitence of Howey may be considered." The Chief Justice, however, suggested that the opinion of the Executive Council should be taken.

The Attorney General, in his report, feared that Aaron Stevens, Dayton Lindsey, Benjamin Simmons, George Peacock, Jr., Adam Crysler, Isaiah Brink and John Dunham must be executed. John Johnson, he thought an ignorant man

who had been deluded by others and who had been humane to prisoners: the Hartwells he said, were enemies and not British subjects. They had, on the outbreak of the war, gone to the United States, and had been taken prisoner by Brock at Detroit. They had been paroled by mistake, and the wise young Attorney General thought that though as residents of Upper Canada they were in law guilty of High Treason, it would be "better not to strain the law to its utmost rigor."²⁴ Of the rest he would say nothing, but he suggested that the President should direct the Judges to order the immediate execution of one or two of the offenders, and that in any case no unconditional pardon should be granted.

Petitions had already begun to pour in. Jacob Overholzer was described as "an unfortunate but honest old man" by many loyal inhabitants of the Township of Bertie as early as June 11. On June 20, many inhabitants of the District of Niagara pleaded for the Hartwells, who had been led to act as they did through ignorance and levity, and later on in July they were joined by many more. Poor Polly Hopkins, wife of Noah Payne Hopkins, on June 29, pleaded her eleven years of marriage and her four children; and, July 8, a large number of the inhabitants of the Niagara District joined in her prayer; for John Johnson and Aaron Stevens, Samuel Hatt and Richard Beasley, J.P's., and George Chisholm spoke. The Executive Council conferred with the Judges and the Attorney General, and after anxious consideration and careful weighing of all the facts, it was determined that seven might be saved from death; these seven, the Hartwells, Cornelius Howey, Isaac Pitt, Jacob Overholzer, Garrett Neill and John Johnson were respited till July 28, to enable proper enquiry to be made and proper terms fixed for commutation.²⁵ But Aaron Stevens, Dayton Lindsey, Noah Payne Hopkins, George Peacock, Jr., Isaiah Brink, Benjamin Simmons, Adam Cryslar and John Dunham must die the death of a traitor. The Chief Justice refused to advise whom to execute but he recommended that as the convicted men were all from the Niagara and London Districts, one at least from each District should be executed: at the same time he pointed out that the President had no power to pardon for Treason.²⁶ The Executive Council asked the opinion of the Judges as to where the executions should take place. The Judges agreed that executions in the respective Districts where the overt acts had been committed would be of most salutary effect; but the majority were of opinion that this could not be legally ordered out of Niagara District in which the convictions were had except by bringing up the convictions into the Court of King's Bench,²⁷ and that was an unusual proceeding, and should be avoided, if possible. They therefore advised that the Sheriff of the Niagara District should be directed to execute some on the boundary line between Niagara and London Districts, but that was not done²⁸: the unfortunates suffered the prescribed punishment²⁹, July 20, 1814, at Burlington Heights, and so ended the Ancaster "Bloody Assize."

What was to be done with the other seven? The Royal Instructions did not authorize the President or any Governor to pardon for Treason³⁰, but gave "power upon extraordinary occasions to grant Reprieves to the offenders, until and to the intent that our Royal pleasure may be known therein." Accordingly a reprieve was granted, and the matter submitted to the Home Government.³¹

The Gaol at York was crowded, and it was decided that these prisoners with others in like case offending should, pending removal to Quebec, be placed in the District Gaol at Kingston. And the seven were given by the Sheriff of the Home District at York, John Beikie, to a Deputy Sheriff, to be delivered by him to the Sheriff of the Midland District at Kingston; with them went Calvin Wood, generally known as Dr. Wood, not quite in the same condition as themselves, but only committed on a charge of High Treason, making a cortege of eight prisoners under guard. They travelled by the Danforth Road, built by Asa Danforth fifteen years before from York to Kingston, and the melancholy cavalcade had got as far as Smith's Creek (now Port Hope) on the evening of July 31. Sergeant Montgomery and his small detachment of militia locked the door of the little hut in which the eight prisoners were confined about a quarter of an hour after midnight; but in the morning they found that four had escaped—Calvin Wood, who seems to have been an expert at breaking out of confinement, Cornelius Howey, the penitent, and the two Hartwells, U.S. citizens. Immediate pursuit was made, and all but Stephen Hartwell were speedily retaken. The seven remaining prisoners were safely delivered to the Sheriff at Kingston, and duly incarcerated in the Gaol there. The reward of \$100 offered by Beikie was ineffective. Stephen Hartwell was never recaptured, he almost certainly was assisted to cross the lake by those secretly sympathizing with the enemy's cause, of whom there was, unfortunately, no lack in the Newcastle District.³²

Communication with England was slow, and no instructions were to be expected until the arrival of the Spring Fleet at Quebec, as the war had put an end to the more speedy communication by post, *via* New York.

In the latter part of the winter there broke out in Kingston Gaol, the dreaded Jail-fever which, under that name, or that of ship-fever, spotted-fever, etc., was the scourge of crowded gaols, ships and other confined places. It was a virulent type of typhus fever, then and for long after believed to be "generated out of filth and overcrowding, bad diet and close, foul air",³³ but now known to be due to the activity of the busy "cootie," as malaria to the mosquito, and the plague to the rat-flea.

Some of the unhappy prisoners were seized with the disease, and three died of it, Garrett Neill, March 6, Jacob Overholzer, March 11, and Isaac Petit, March 16, 1815.³⁴ The other four received a pardon conditioned on their abandoning the Province and all other British possessions for life,³⁵ (which meant going to the United States). Their comrade, "Dr." Calvin Wood, did not wait for formal permission to take shelter across the international boundary; he had been accused by James McCarthy, of East Gwillimbury, of saying that if he could get a few hands he would go to Newmarket and disarm and seize the whole sentry guard, and he had also been accused by William Huff, Yeoman, of East Gwillimbury, of giving the enemy information of where the guns and other arms were lodged at York, for which he got seven barrels of flour; also that at an earlier date he was given a bag of ball and cartridge by Major Forsyth, of the U.S. army. He judged it wise not to wait for trial; and so with two others, he made an escape from the Kingston Gaol, June 9, 1815; that was the third time he had escaped, and as

Sir Frederick Robinson, the Administrator of the Government, complains "his being apprehended on the former occasions was not owing to any activity on the part of either the Gaoler or the Sheriff."³⁶ No good fairy assisted the authorities this time; and Wood also went to "the land of the free and the home of the brave."

After all the convicts had been disposed of, the next step was to proceed against those who had not been apprehended, but against whom indictments had been found for High Treason by the Grand Jury at Ancaster.

Robinson had gone to England to study for and be called to the Bar there, but D'Arcy Boulton returned from his prison in France, and became Attorney General on the last day of 1814. He did not delay, but he had the proper proclamations made under the Provincial Act of 1815; and, May 27, 1817, he had the satisfaction to have entered up judgments of outlawry against nearly thirty persons, amongst them the leader in treason, Abraham Marcle³⁷; and many of these had lands which were forfeited to the Crown.

³⁶As every lawyer knows, this crime was called *High Treason* to distinguish it from *Petit Treason*, which, according to the Statute of 1350, 25 Edward III, c. 2, renewed by (1399) 1 Henry IV, c. 10, may happen in three ways: by a servant killing his master, a wife her husband, or an ecclesiastic his Prelate to whom he owes faith and obedience. The crime of *Petit Treason* was abolished and the offence made murder in England in 1828 by 9 Geo. IV, c. 31, s. 2, renewed by 24, 25 Vic. c. 100, s. 8; in Canada in 1841 by 4, 5 Vic. c. 27, s. 2.

³⁷Spelled also, even in official papers "Markle" and "Maracle." He was a member of the firm of Biggars, Markle & Co., who owned the Union Mills, with 109 acres, at Ancaster. Can. Arch. Sundries, U.C. August 10, 1816; Sundries, U.C. 1817. He is not to be confused with Henry Marcle (or Markle) who represented Dundas in the House of Assembly in the Fifth Parliament, 1808-1812. Henry Marcle's name is misprinted "Maule" in the Ontario Archives Reprint of the Proceedings of the House of Assembly for Upper Canada for 1810, at p. 284—but the correct form is given at page 285—the Index repeats the error. Ont. Arch., 8th Report (for 1911), pp. 284, 285, 493.

³⁸See letter from Lieut.-Colonel E. B. Brenton to Captain Loring, the Governor's Secretary, from Montreal, June 21, 1814. Can. Arch., Sundries, U.C. 1814.

³⁹See letter from Captain Loring to Lieut.-Colonel Brenton from York, U.C. June 18, 1814. Can. Arch. Sundries U.C. 1814. "Abraham Markle, the principal instigator and conductor of the late burning and plundering expedition of the enemy to Long Point . . . he followed the example of the celebrated Joe Wilcocks (see note 5 post) and went over to the enemy." See also letter from Sir Gordon Drummond to Earl Bathurst, July 10, 1814 (note 3 post).

⁴⁰An unusually accurate account of this little battle is given in Kingsford's History of Canada, Volume VIII, pp. 444, 445.

Marcle in his petition to Sir Roger Sheaffe, Administrator of the Government of Upper Canada after the death of Sir Isaac Brock, October, 1812, till June 18, 1813, the petition being dated Kingston, June 18, 1813, said that he was loyal, that he was one of four brothers who had left home and come to Upper Canada and served in the Butler's Rangers during the Revolutionary War; that his only son old enough to bear arms was in the Dragoons, and that his arrest and detention as a traitor was wholly unjust. Can. Arch., Sundries, U.C., 1813.

Sheaffe sent him on to Lower Canada to the Governor General, Sir George Prevost, who gave him his liberty as stated in the text.

Marcle's subsequent fate, so far as this Province is concerned, appears from the Proceedings of the House of Assembly for 1814. Ont. Arch., Ninth Report (for 1912) p. 111.

Saturday, February 19, 1814. "On motion of Mr. Nichol (Robert Nichol, Member for Norfolk and living at Stamford, who afterwards broke his neck falling down the mountain) seconded by Mr. Burwell (Mr. Mahlon Burwell, Member for Oxford and Middlesex), sufficient evidence having been offered to this House of Abraham Marcle, one of its members having traitorously deserted to the enemy, and of his having actually

borne arms against His Majesty's Government, That this House, entertaining the utmost abhorrence of such disloyal and infamous conduct which has rendered him incapable and unworthy to sit and vote in this House, do declare his seat vacant, and that he shall no longer be considered a member thereof." Carried *nem. contradic.*

The same day, Joseph Willcocks, Member for the First Riding of Lincoln, was expelled for the same cause. Willcocks was afterwards killed at Fort Erie in the uniform of a Colonel in the U.S. army. He was the "Joe Willcocks" of Capt. Loring's letter. (See note 4 *ante*).

See also letter from Allan MacLean, the Speaker of the House of Assembly, to Sir Gordon Drummond, the Administrator, York, U.C., March 12, 1814. Can. Arch., Sundries, U.C., 1814.

⁸Sometimes spelled "Baustwick."

⁹These were Joseph Fowler, Adam Chrystler, Griffis Collver, Isaac Pettit, William Carpenter, Datis Linsey and Wadsworth Philips. We shall meet again Chrystler, Pettit and Linsey.

William Carpenter was released in April, there being no evidence against him. See letter of John Beverley Robinson to Captain Loring, York, April 22, 1814, Can. Arch., Sundries, U.C., 1814.

¹⁰D'Arcy Boulton, an Englishman, who had received a Licence to practise under the Act of 1803, 43 Geo. III, c. 3, and had been called to the Bar, Easter Term of that year; he was appointed Solicitor General in 1805 on the death in the "Speedy" disaster of the first Solicitor General, Robert Isaac Dey Gray. On his way to England he was taken prisoner, 1810, by a French Privateer and taken as a prisoner to France, where he remained until the temporary peace of 1814. (There are several certificates of his being alive and a prisoner, given in this interval to enable him to receive his salary). On his return late in 1814 to the Province he became, December 31, 1814, Attorney General, and Robinson, Solicitor General five weeks afterwards. When Boulton became a Justice of the Court of King's Bench, 1818, in succession to the notorious Mr. Justice Thorpe, Robinson became Attorney General, and Boulton's son, Henry John Boulton, became Solicitor General—the "deal" whereby this was effected is delectable reading which few have been privileged to see but which can be seen in the Canadian Archives at Ottawa.

John Beverley Robinson was admitted on the Rolls of the Law Society, Hilary Term, 1808. He was born July 26, 1791, and was still a student-at-law when John Macdonell, the fourth Attorney General, received his death wound on Queenston Heights, October, 1812. Mr. Justice Powell, notwithstanding that Robinson had not yet been called to the Bar, persuaded his old friend, Sir Roger Sheaffe, to appoint him Acting Attorney General in the absence of D'Arcy Boulton, the Solicitor General, who was entitled to the promotion. Robinson proved in every way equal to the trust. He was not called until Hilary Term, 1815, but the Law Society, Act (1797) 37 Geo. III, c. 13, s. 2, made him a Benchler of the Society, *ex officio*—so much so that the Chief Justice, Thomas Scott and Mr. Justice William Dummer Powell, September 25, 1813 united in a recommendation to the Governor General, Sir George Prevost, to appoint him Attorney General (Can. Arch., Sundries, U.C., 1813). On Boulton's return, as we have seen, he became Solicitor General, then Attorney General, and at length Chief Justice of the Province, 1829-1862.

¹¹Wadsworth Philips. See Robinson's Report, York, February 18, 1814—Can. Arch., Sundries, U.C., 1814.

¹²Technically the General Quarter Sessions could try all felonies and misdemeanours, and during the times of the Tudor and Stewart Kings, thousands were hanged by these Courts, but by the time Canada became British, the Quarter Sessions (in practice) sent all capital cases to the "Assizes."

¹³I subjoin a copy of an actual Commission of Oyer and Terminer and General Gaol Delivery issued to William Dummer Powell "and his Fellows." Powell being "of the Quorum." (See at the end of the notes).

¹⁴The Ontario lawyer will be reminded of the Court of General Sessions of the Peace in which every Justice of the Peace is entitled by law to sit, and some have been known to sit on the Bench, but the "Chairman," the County Judge, is not interfered with.

¹⁵Ancaster was near the Military Post on Burlington Heights, and this was one reason for choosing it as the "Assize Town." The Secretary in drawing up the Commission made the mistake of calling the place Burlington; but John Beverley Robinson drew attention to the fact that there was no place of the name of Burlington in the

Province. "The little Lake has received the name of Burlington Bay, and from it the military posts on the Heights are usually called Burlington, but there is neither Town or Township of this name within the Province. Ancaster and Barton are the Townships in that neighbourhood, in one of which I presume the Court will be held." Robinson asked for and received consent to change the name from Burlington to such place as the Judges should appoint, unless the Governor should choose to name it himself. It is not probable that the Statute of (1541) 33 Henry VIII. c. 23 was applied; that required certain formalities to be complied with, including an examination before the Council, and there is no record of such proceeding being had. It seems probable that the overt acts relied upon to prove treason were alleged to have been committed in the Niagara District. This District was formed by the Act of (1798) 38 Geo. III. c. 5, the same Act as gave authority to break off Northumberland and Durham from the Home District to form the Newcastle District, so that by 1802, the old Home District was broken up into three Districts, Niagara, Home and Newcastle; the Home District was originally the same as Dorchester's Nassau District of the Proclamation of 1788, the name being changed to Home by the First Parliament of Upper Canada (1792) 32 Geo. III. c. 8. Gore District was not formed until 1816 by 56 Geo. III. c. 19. As to the Act of 1541 in Canada see my article "Extra Provincial Jurisdiction of Canadian Courts" 40 Canada Law Times, June, 1920, pp. 491. sqq. Moreover the Parliament of Upper Canada itself passed a more comprehensive Act which enabled a Court of Oyer and Terminer in any District to try Treason, misprison of Treason, or Treasonable practice committed in any District whatsoever in the Province (1814) 54 Geo. III. c. 11 (U.C.).

¹⁴See letter Robinson to Loring, York, April 22, 1814, referred to in note 7 *ante*: the junior seems to have been Henry John Boulton.

¹⁵See letter Robinson to Loring, York, April 29, 1814. Can. Arch., Sundries, U.C. 1814.

¹⁶do. do. do. Robinson was often charged in times a little later with pressing the charges too strongly; that he was the mainspring of the prosecutions is beyond question, but there is no evidence that he acted more vindictively than was supposed at that time to be the duty of a Crown Counsel. His political enemies did not scruple to call this Assize the "Bloody Assize" and to compare it, very unjustly, to the Bloody Assize of the infamous Jeffreys.

¹⁷The Judges in an official communication to "John Robinson, Esquire," dated 3 May (probably 12 May), 1814, say that proceedings are to be taken without further delay; and they add "should it happen from the difficulty of subsistence, or any other cause, that the Court cannot proceed to the trial of the indictments which may be found, it will exercise its discretion in adjourning." Can. Arch., Sundries, U.C. 1814.

¹⁸See letter Robinson to Loring, York, May 12, 1814. Can. Arch., Sundries, U.C. 1814. He adds: "If there be any unfortunate confusion the Court may be adjourned," and "If indictments are found and prisoners escape, I will pursue them to outlawry." The former of these extracts refers to the possibility of an invasion and attack by the enemy, no remote possibility, he it said. Neil MacLean, the Sheriff of the Eastern District, writing from Charlottenburg, November 19, 1813, with the information of the landing of the troops of General Wilkinson in the Township of Matilda, says that the gaol became unsafe and he ordered a guard to take the prisoners to Coteau du Lac to Colonel Scott—Reuben Ainsworth and Richard Boyer, committed for crime, Alexander Hoover, a debtor, and John Fulton, both dangerous and disaffected persons; Ainsworth jumped out of the window guarded by two men the day before they were to leave; the others were delivered to Col. Scott." Can. Arch., Sundries, U.C. 1813. See my article, "The Green Goods Game in 1815," 40 Can. Law Times (for March, 1920) p. 187, n. 10.

There were frequent instances of removal of prisoners from gaols and other places of confinement in exposed areas. One of interest to Ontario lawyers is detailed by Thomas Taylor, our first Law Reporter, who, June 19, 1814, writes from York to Lieut.-Colonel Foster with a list of prisoners sent from Burlington to York, twenty-three in all; "they could not be brought for trial at Ancaster; all except Daniel Whitman for the murder of his wife, Lewis Lyons for robbery and Joshua Thompson for robbing a store are sent for safe-keeping." Can. Arch., Sundries, U.C. 1814.

The second of the two extracts refers to the old practice, now no longer in force. When an indictment was found for a petty misdemeanour or on a penal statute, a writ of *venire facias* issued, being in effect a summons to appear. If the accused appeared and pleaded to the indictment his trial proceeded; if he appeared and refused to plead, the *peine forte et dure* was applied and he was placed under a heavy weight in dungeon

low until he pleaded or died. If he did not appear and had lands in the county, a *distress infinite* issued from time to time until his property was all seized or he appeared. If he had no lands, or if his property was all under seizure, a writ of *capias* issued to the Sheriff to take his person and have him at the next Assizes; if that failed a second, an *alias capias* issued, and that failing a third, a *pluries capias*; that failing, the accused (in England) was put to the *exigent*, i.e., a writ of *exegi facias* was issued to the Sheriff under which he was proclaimed and required to surrender at five County Courts, and if he should be returned *quinto exactus*, five times required, he was adjudged to be outlawed or put out of the protection of the law.

In Indictments for Treason or Felony, a *capias* was the first process, no *venire facias* or *distress* being allowed; and in Treason or Homicide only one *capias* was allowed issue; then on a return of *non est inventus* by the Sheriff, the accused was put to the *exigent* as in minor offences.

The results of outlawry have been absurdly misunderstood; it did not give to anyone the right to kill the outlaw except where the outlaw was resisting arrest, and every one had the right to arrest an outlaw. If he should be captured, the Justices sent him to the gallows, out of hand, without trial, on the mere proof of outlawry unless the offence was a mere trespass for which "minor outlawry" had been provided. In other respects, too, the consequences of outlawry were serious enough to the outlaw. His property was forfeited and escheated and he could not appeal to the Courts.

There was a practice of outlawry in civil matters very similar to that in criminal matters, but that subject is outside the purview of the present enquiry.

There were no County Courts or Sheriff's Courts in Upper Canada formally established, although it was considered that there was incident to the office of Sheriff, a Court of exclusive jurisdiction, wherein all persons named in the legal writ of *exigent* should be demanded and required to appear; the fact, however, that each District, the Bailiwick of a Sheriff, contained several Counties caused what was called the "Legal County Court," to fall into disuse in the Province. The legality of such Courts was at least doubtful. On the opening of Parliament in February, 1814, the President, Sir Gordon Drummond, in his address to the House, said, "A due regard to the interest of the loyal subject requires that means should be adopted to punish such traitors as adhere to the enemy by confiscation of their estates. It may often happen, as in the case of the two Representatives (Marble and Willcocks) of the people that they may withdraw from the process necessary for legal conviction. To obviate this an Act of Attainder by the Legislature may subvert to the usual process of outlawry." Ninth Rep. Ont. Arch. (for 1912) p. 104. A proper reply was made by the House of Assembly (do. do., p. 107): "We . . . shall endeavour to frame such regulations as in our opinion may best answer for the confiscation of the property of such traitors as may have joined the enemy and who may not be within the reach of legal conviction." They did not find it necessary to pass an Act of Attainder, always an odious measure; but they did declare to be aliens those who having been residents of the United States had claimed to be British subjects and renewing their allegiance by oath had solicited and received grants of land or obtained land in some other way, and then withdrawn from their allegiance. These were declared incapable of holding land, and a Commission was authorized to enquire so that the lands would revert to the Crown subject to the claim of any creditor, Lienor, etc., (1814) 54 Geo. III, c. 9 (U.C.).

An Act was also passed repealing, so far as the Province was concerned, the English Act of 7 Anne, c. 21, which abolished Forfeiture of Inheritance upon Attainder of Treason after the death of the Pretender and his sons (1814) 54 Geo. III, c. 14 (U.C.).

And the process of Outlawry was provided for (1814) 54 Geo. III, c. 13 (U.C.), making the Court of Quarter Sessions of the Peace the Court for the Sheriff to make his demands under the writ of *exigens*; and authorizing the Court of King's Bench on the usual return of *non est inventus* in the *alias* and *pluries capias*, to issue a writ of *exigent* requiring the Sheriff to demand the party at three successive Courts of Quarter Sessions of the Peace, and to affix a copy of his Proclamation at the door of the Court House, and upon the third demand (instead of the fifth as in England) if the party did not appear, Judgment of Outlawry was to be pronounced by the Coroner and returned by the Sheriff.

This process of Outlawry was amended and simplified the next year by (1815) 55 Geo. III, c. 2 (U.C.); this statute was to be in force for two years only, but it was revived in 1833 for six years by 5, 6 Will. IV, c. 5, and made perpetual by

(1839) 2 Vic., c. 7. after the Mackenzie Rebellion. This came forward in the Consolidation of 1859 as C. S., U.C., c. 17, 52; and while it was recommended for repeal, it was not in fact repealed: R.S.O. (1877), c. 44, s. 3; R.S.O. (1887), c. 48, s. 3; R.S.O. (1897), c. 56, s. 3; and the provision did not disappear from our Ontario Statutes until 1909, 9 Edw. VII, c. 30. Outlawry in criminal matters was abolished in Canada by the Act of (1892), 55, 56, Vic., c. 29, s. 962; in civil matters it disappeared on the passing of the Common Law Procedure Act of 1856, 19 Vic., c. 43, which by sec. 35 made a substitute.

¹²As an example of the course taken by Crown Counsel, may be read the report of the first Crown case prosecuted by Coke after the accession of James I, the trial of Sir Walter Raleigh (1603), 2 How. St. Tr. 1: sufficient may be seen in the account given by Lord Campbell in the most interesting (*me judice*) of all legal works "The Lives of the Chief Justices of England," vol. 1, pp. 257, s. 99. (Murray's Edition. London, 1849.)

²⁰This will be discussed later (see note 29 *infra*).

²¹At the Common Law the Sheriff was to execute the condemned within a convenient time, but in 1742, the statute 25 Geo. II, c. 37, directed that the Judge should direct execution the next day but one after the sentence.

In 1841 the Parliament of the Province of Canada enabled the Judge to have the sentence recorded instead of being pronounced in open court (1841), 4, 5 Vic., c. 24, sec. 33 (Can.); by the Dominion Acts (1869), 32, 33 Vic., c. 29, and (1873), 36 Vic., c. 3, a change was made whereby the Trial Judge was directed to fix a day for the execution sufficiently remote to allow the signification of the Governor's pleasure to be made—that is substantially the present law.

²²See letter, Robinson to Loring, from Ancaster, June 20, 1814. He says: "His Honour, the Chief Justice" will report, etc.; nor was this title an inadvertence; it was not till the Chief Justiceship of Robinson himself that the Judges were spoken of and to as "Lordship;" before that time they were "Your Honour," as they were in the Lower Province until the other day. In making a report, June 29, 1814, in the name of the Chief Justice, Powell writes: "His Honour the Chief Justice"—and more than one paper in Powell's handwriting can be seen in the Archives with the same terminology. Can. Arch. Sundries, 1814.

²³In the Canadian Archives, Sundries, 1814.

²⁴Can. Arch. Q. 318, 1, 129, Letter Robinson to Loring, York, June 18, 1814.

²⁵Chief Justice Scott writes, York, July 14, 1814, complaining that the form of the reprieve is inaccurate; the sentence was to be "hanged by the neck but not until his Death for he must be cut down alive and his Entrails taken out and buried before his Face, his Head then to be cut off and his Body divided into four Quarters and his Head and Quarters to be at the King's Disposal" Can. Arch. Sundries, U.C., 1814. See note 29, *infra*.

²⁶See his letters of July 3 and July 8, 1814.

²⁷Every student of the history of the English constitution will remember the attempt on the part of James II to override the law by his sovereign will and to put martial law in force against military men without parliamentary authority. He caused a motion to be made before the Court of King's Bench for the execution at Plymouth of a soldier convicted at Reading of desertion. Chief Justice Herbert (who had been looked upon as a mere tool of the King) refused the motion "in some heat" as the prisoner was never before the Court then a Habeas Corpus was issued and the soldier brought before the Court. But Herbert and Mr. Justice Wythens (otherwise unknown to fame) again refused the motion, saying that the prisoner being condemned in Berkshire could not be sent to another County to be executed. Three days after, a *superseas* replaced Herbert by Sir Robert Wright, "and Sir Francis Wythens had his *quietus* the night before," and the new Chief Justice promptly made the order desired. That judgment established the law already spoken of, that a prisoner condemned to death brought before the Court of King's Bench may be directed by that Court to be executed anywhere within its jurisdiction, but it was the Pyrrhic victory for the King.

The story is well told by Lord Campbell, "Lives of the Lord Chief Justices," (Thompson's edition), Vol. II, pp. 93, 94 (a trifling error as to the date of the supersession of C. J. Herbert is made). See also, *Rex v. William Beal* (April, 1687), 3 Modern Reports, 124.

²⁸See the opinion of the Chief Justice after consulting the other Judges, July 5, 1814. Can. Arch. Sundries, 1814. The *Quebec Gazette* of August 18, 1814, says

that the execution took place at Burlington, i.e., of course, Burlington Heights, where the Hamilton Cemetery now stands.

²⁰ At that time the sentence for high treason was in the form presented for centuries by the Common Law:

- (1) That you are to be drawn to the place of execution,
- (2) Where you must be hanged by the neck, but not until you are dead, for you must be cut down alive
- (3) And your bowels taken out
- (4) And burned before your face (or your being still alive),
- (5) Then your head must be severed from your body,
- (6) Which must be divided into four parts, and
- (7) Your head and quarters to be at the king's disposal.

It is probable that originally there was no interval between sentence and execution and the unhappy convict was drawn at once to the gallows; but at least as early as the sixteenth century the prisoner was ordered first to be taken to the place whence he came and thence to the place of execution.

Even in quarters usually well informed there is occasionally to be found a misunderstanding of the meaning of "drawn" in this sentence. It is supposed to be equivalent to "eviscerated," as a market woman "draws" a chicken. It really means that the convict is to be dragged to the gallows. Originally he was dragged by the heels at the horse's tail over the rough and filthy ground, which sometimes killed the victim. Sometimes, as in the case of William Longbeard in 1196, rough stones were placed in the road to make the transit more painful.

But humanity was not wholly dead, and we find sometimes an ox-hide, sometimes a hurdle spread under the sufferer by friars or others. Mr. Justice Shaw in 1340 forbade this in a peculiarly atrocious case of a servant killing his former master.

The "Common ox-hide" became an institution, and it later gave way to the hurdle. From contemporary woodcuts it appears that the hurdle was of wicker, flat and oblong, about seven feet by four feet. The prisoner was bound on it, feet toward the horse, which was attached to the hurdle and drew it along like a stone-boat. Later the sledge came into use, although the word "hurdle" was used to denote it, and by this time every convict who was to be drawn to the gallows had a "hurdle" to ride on.

(1) While the express words of the sentence prohibited hanging until death, it came to be the practice to allow death to intervene before cutting down. This was not always the case, as when Townley was executed on Kensington Common in July, 1716 (see R. v. Townley, 1746, 18 St. Tr. 829), life was found in him when he was cut down and the executioner failing to kill him by blows on the chest, immediately cut his throat.

(2) While sometimes the whole of the viscera, thoracic and abdominal, were taken out, in the course of time, in most cases only a small incision was made and a small part of the viscera was burnt.

(3) A platform was placed near the gallows on which a fire was lit and the entrails burnt.

(4) "The Head of a Traitor" was always held aloft and shown to the spectators by the executioner.

(5) While originally the body was always quartered and the parts usually sent to different parts of the kingdom, the practice grew up of simply nicking the limbs at their junction with the trunk, which was taken as a symbolic quartering.

Sometimes an additional monstrosity was added, ementulation, e.g., William Wallace, the Scottish patriot suffered thus:

"Primo per plateas Londonia ad caudas equinas tractus usque ad patibulum altissimum sibi fabricatum, quo laqueo suspensus, postea semivivus dimissus, deinde abscissis genitalibus at evisceratis intestinis ac in ignem crematis, demum abscisso capite ac trunco in quatuor partes secto, caput palo super pontem Londoniae affigitur: quadri-fida vero membra ad partes Scotiae sunt transmissa." ("Flores Hist." ed. Luard, iii, 124.)

So, too, in the "Popish Plot," Ireland, Pickering, Grove, Langhorn and others were sentenced to suffer in this way, while Stayley, Coleman, Fitzharris and Plunket were not. Coke sentenced John Owens, alias Collins, to this in 1615; there does not seem to be any explanation of why it was ordered in some cases and not in others wholly parallel.

Those interested will find the whole subject discussed at length in Marks' "Tyburn Tree, Its History and Annals," London, Brown, Langham & Co., n. d. (not earlier than September, 1908) from which much of the above has been taken.

The case of Rex v. Walcott (1696), Shower 127; 1 Eng. Rep. 87, may be noted. Thomas Walcott had been convicted of high Treason (he took part in the Rye House Plot, 1683), and was executed at Tyburn. His sentence ran: "Quod predictus Thomas Walcott ducatur ad Gaolam dicti Domini Regis de Newgate unde venit et ibidem super Bigam ponatur et abinde usque ad furcas de Tyburn trahatur et ibidem per Collum suspendatur et vivens ad terram prosternatur, et quod secreta membra ejus amputa(n)tur et interiora sua extra ventrem suum capiantur, et in ignem ponantur et ibidem comburentur, et quod caput ejus amputetur, quodque corus ejus in quatuor partes dividatur et illae ponantur ubi Dominus Rex eas assignare voluit."

Twelve years afterwards the attainder consequent upon this judgment was reversed on writ of error by the Court of King's Bench, and in 1696 this reversal was affirmed in Dom. Proc., the sole ground being that the words "ipso vivente" were omitted after "comburentur" and no words used that would be tantamount, such as "en son view." To the argument that it would be impossible to burn a man's bowels when he was alive it was answered, "Tradition saith that Harrison, one of the Regicides, did mount himself and give the executioner a box on the ear after his body was opened." The whole report is replete with learning on this horrible subject.

See my paper "Canadian State Trials: The King v. David McLane," Trans. Roy. Soc. Can. Series III, Vol. X (1916), pp. 332, 334.

Chief Justice Scott, in a letter to Drummond, July 14, 1814, Can. Arch., Sundries, U.C., 1814, says: "In point of fact this sentence is never exactly executed; the executioner invariably taking care not to cut the body down until the criminal is dead, but the sentence of the law is always pronounced."

³⁰ See the Royal Instructions to Lord Dorchester. Fourth Ont. Arch. Rep., (for 1906), p. 168.

³¹ It may be worth while to quote the original despatch from Sir Gordon Drummond to Lord Bathurst, Can. Arch., Q. 318, 1, 174. Writing from Kingston, U.C., July 10, 1814, he says: "A band of Rebels in the District of London under a notorious partizan leader made incursions on unprotected parts of the country, a number of loyal inhabitants, Militia, volunteered, attacked and (January, 1814) took about 15 prisoners. To make an example of these miscreants and the like a Special Commission (of Oyer and Terminer) was issued for London, Niagara and Home Districts. The Court sat from May 23 to June 21, seventeen persons were tried out of seventy indictments for High Treason—fifteen were convicted and were to be executed, July 20. Mr. Robinson, Acting Attorney-General prosecuted and his conduct was highly meritorious and praiseworthy." The Chief Justice and Acting Attorney-General advise, and Drummond agrees, that it is not necessary to execute all, and seven have been reprieved for His Majesty's pleasure as to their execution or perpetual banishment. That they were intended to be taken to Quebec appears from a letter, Can. Arch. C. 703, E. p. 55.

³² Robinson was very angry at the escape. He wrote to MacMahon, the Governor's Secretary, from Brockville, September 10, 1814, that the escape was due to the negligence of the Deputy Sheriff. "It is punishable by a criminal prosecution for neglect and so frequent and inexcusable are his faults of this nature that I think the Sheriff of the Home District should be compelled to find a more efficient Deputy." Can. Arch. Sundries, 1814. I cannot find the name of the Deputy Sheriff, and there is no record of any criminal prosecution or other proceedings against him.

Notwithstanding the general opinion, and little flattering as it is to Canadians of that time, it must be admitted that there was undoubtedly a want of loyalty, or at least a want of willingness to fight the invaders, exhibited by the Canadian settler on more than one occasion, and at more than one place. A contemporary work published in 1812, written by Michael Smith, who was an itinerant Baptist preacher from the United States, but who had lived in Upper Canada for some time before the war and had been allowed by the Government to leave the province on the outbreak of the war, a number of statements are made which are corroborated by facts which are well known. The book is called "A Geographical View of the Province of Upper Canada, etc."

On page 87 (3rd edition, Philadelphia, 1813), he says: "It was generally thought in Canada if Hull had marched in haste from Sandwich to Fort George, the province

would then have been conquered without the loss of a man . . . Brock . . . ordered some part of the militia from the District of London, about 100 miles from Sandwich, to march there. This many refused to do of their own accord, and others were persuaded so to refuse by a Mr. Culver, a Mr. Beamer, and one more who rode among the people for six days telling them to stand back. Whenever the officer came to warn the inhabitants to meet at such a place to receive arms and orders to march against Hull, they promised to go; but instead of going they took some provision and went to the woods, and there waited in hopes that Hull would soon accomplish his promise, but, poor things, they were deceived and had to return and obey orders."

After the surrender of Hull "the people of Canada became fearful of disobeying the government: some that fled to the wilderness returned home, and the friends of the United States were discouraged and those of the King encouraged . . ." In the Talbot papers will be found some account of this trouble in the London District.

On p. 93, Smith says that about twelve days after the Battle of Queenston Heights "Col. Graham on Yonge Street, ordered his regiment to meet in order to draft a number to send to Fort George; however, about forty did not appear but went out into Whitechurch Township, nearly a wilderness, and there joined about thirty more who had fled from different places. When the regiment met there were present some who had liberty of absence a few days from Fort George; these, with others, volunteered their services to Col. Graham to the number of 160, to go and fetch them in, to which the Colonel agreed but ordered them to take no arms, but when they found they must not take arms they would not go. At the first of December they had increased to about 300, about which time, as I was on my way to Kingston to obtain a passport to leave the province, I saw about 50 of them near Smith's Creek (now Port Hope) in Newcastle District on the main road with rifle and drum, beating for volunteers, crying huzza for Madison (the President of the United States). None of the people in this district bore arms at that time, except twelve at Presqu'île Harbour. They were universally in favour of the United States, and if ever another army is landed in Canada this would be the best place; . . . many of the Canadian militia would desert . . . but . . . an army dare not rebel, not having now any faith in any offers of protection in a rebellion, as they have been deceived."

³³The Sydenham Society's Lexicon published 1887. The "cootie" is the body-louse, *pediculus corporis*, its pestiferous qualities were discovered but the other day. In my time as a student of medicine it was taught that typhus and typhoid fevers were different in their aetiology, the former being due to bad air, the latter to bad water. The description, however, of typhus is unchanged, "an acute, specific, epidemic, contagious, exanthematous fever."

³⁴See the report of Charles Stuart, Sheriff of the Midland District, dated at Kingston, July 28, 1815. This report was sent to MacMahon. Can. Arch. Sundries, U.C. 1815. The overcrowding of Gaols at that time was notorious and probably unavoidable. In a Petition of the Justices of the Peace of the Eastern District at Cornwall, March 15, 1815, they say that in the Gaol at Cornwall there were confined three persons charged with murder, and seven charged with felony; that the Gaol had been and still was occupied as a barracks and that no part of the building was sufficient to hold prisoners in safety. They ask for a special Commission of Oyer and Terminer and General Gaol Delivery to deliver the Gaol. Can. Arch. Sundries, U.C., 1815.

³⁵Banishment for crime came to an end in Canada in 1842 on the passing of the Statute 6 Vic., c. 5 (Can.), which, by sec. 4, enacted that instead of transportation or banishment there should be imprisonment in the provincial penitentiary or other prison.

³⁶See Sir Frederick's letter to Col. Foster, the Military Secretary of the Governor-General, from Kingston, June 13, 1815. Can. Arch. Sundries, U.C., 1815. For the charges against the elusive "Dr." Wood, see Can. Arch. Sundries, U.C., 1813.

³⁷The list given by Boulton in his report to Lieut.-Col. Cameron, the Governor's Secretary, York, May 27, 1817, Can. Arch. Sundries, U.C., 1817, is as follows (the names of those known to have lands are marked "L") :—In the District of London:—Andrew Westbrook, "L" Isaiah Dean, "L" Silas Dean, William Biggar, Eleazer Daggett, Oliver Grace Jr., "L" Barnabas Gibb et al., "L" Eliakim Crosby and "L" Benjamin Mallory. In the District of Niagara: Daniel Phillips, William James, Ira Bentley, Asa Bacon, Epaphras Lord Phelps, Joseph Lovett, Ebenr. Kelly, Phineas Howell, Abraham Markle, William Merritt, Abraham Hardey, George Cain and five others.

in the District of Newcastle: Abraham Winn (Sedition). The Attorney General added that it would be necessary to issue a Commission to enquire what lands the offenders had at the time of the offence committed; and Commissions were in fact issued.

The Law Reports contain a case with which the name of the executed traitor, Aaron Stevens, is connected. He had considerable land, one part being 450 acres in Whitby: by his will made almost a year before his death he left all his real and personal property equally to his seven sons and five daughters. By his attainder all his lands vested in the Crown under the Statute of 33 Henry VIII. c. 20 s. 2, and the Provincial Statute of 1819, 59 Geo. III, c. 12 (U.C.) vested them in Commissioners, who sold some, but apparently not the Whitby land. In 1851, Stevens' attainder was reversed and the corruption of blood and forfeiture wrought by his attainder avoided by the Act (1851) 14, 15 Vic., c. 170 (Can.), but nothing was to affect the title to land which the Commissioners had sold.

Nicholas Stevens, the eldest son of Aaron Stevens, (there were some doubts thrown on his legitimacy as having been born before the marriage, but on this point there was no precise testimony) sold the Whitby land in 1831 to one, Clement. A great number of persons, children and grandchildren of Aaron Stevens and the husbands of some of them brought an action in ejectment against Clement after the Statute of 1851, claiming under the will already mentioned and failed at the trial. In term the Court of King's Bench, Robinson, C. J., Draper and Burns, J.J., dismissed the appeal, holding that the will had not been proven and also that the plaintiffs had not proved that the Whitby land had not been sold by the Commissioners while this was in a sense negative evidence, the Forfeited Estates Act (1819) 59 Geo. III, c. 12 (U.C.) provided for making and preserving records of all estates so dealt with, and the fact was of easy proof. *Doe dem Stevens et al. v. Clement* (1852), 9 U.C.R. 650. This was almost certainly a miscarriage of justice. At the present day the will would have been proved without difficulty and the "Lessors of the Plaintiff" would have been allowed to supplement their proof by producing the records of the Commissioners. *Tempora mutantur et nos mutamur in illis.*

More interesting is the story of the land of Epaphrus Lord Phelps. He was a white schoolmaster who had married a Mohawk woman, Esther, who bore him three children. Captain Joseph Brant, May 1, 1804, leased to him, for 999 years, one thousand acres of land on the Grand River to provide for his Indian wife and her children. The land was forfeited to the Crown on Phelps' outlawry and Esther was allowed to contest the escheat in the Court of King's Bench. She failed; a report of the case is to be found in Taylor's King's Bench Reports (1828) at pp. 47-54; the principle argued for by Solicitor-General Boulton that "the Indians are bound by the Common Law" was approved by the Court. See my article "The Sad Tale of an Indian Wife," 13 Journal of Criminal Law and Criminology, May, 1922, pp. 82-89.

The following is the Commission issued to Mr. Justice William Dummer Powell, referred to in Note 11, supra:—

SIG'D, DORCHESTER GOV:

Recorded in the Office of Enrollments at Quebec the 20th Day of January 1791, in the third Register of Letters Patent & Commissions, folio 112

Geo. Pownall,

—Fiat—GEORGE THE THIRD, by the Grace of God, of Great Britain, France and Ireland, KING, Defender of the Faith and so forth. TO OUR TRUSTY and Well beloved William Dummer Powell Our first Justice of OUR Court of Common Pleas of and in OUR District of Hesse in OUR Province of Quebec, and to William Lamothe, St. Martin Adhemar, William McComb, John Askin and George Meldrum, Esquires, Justices of the Peace for the said District. GREETING: KNOW YE that WE have assigned you and any three of you (of whom WE will that you the said William Dummer Powell be one) to inquire by the Oath of Good and Lawful Men of the District aforesaid by whom the truth

if the matter may be the better known, and by other ways, methods and means wholly you can or may the better know, as well within liberties as without, more fully the truth of all Treasons, Misprisions of Treason, Insurrections, Rebellions, Murders, Felonies, Manslaughters, Killings, Burglaries, Rapes of Women, unlawful meetings and Conventicles, unlawful uttering of words, unlawful assemblies, misprisions, Confederacies, false allegations, Trespasses, Riots, Routs, Retentions, Escapes, Contempts, Falsities, negligencies, Concealments, Maintenances, Oppressions, Champarties, Deceits, and all other Misdeeds, Offences and injuries whatsoever, and also the accessories of the same within the District aforesaid, as well within Liberties as without, by whomsoever and howsoever, done, perpetrated and Committed, and by whom and to whom, when, how and in what manner, and of all other Articles and Circumstances whatsoever, the premises and every or any of them howsoever concerning, and the said Treasons and other the premises according to the Law and Custom of England and the Laws of this Province for this time to hear and determine. And therefore WE command you that at certain days and places which you or any three of you (whereof WE will that you the said William Dummer Powell be one) shall for this purpose appoint within and for the space of six Calendar Months from the day of the Date of these Presents, you do concerning the Premises make diligent inquiry, and all and singular the Premises hear and determine and those things do and fulfil in form aforesaid which are and ought to be done and to Justice doth appertain according to the Law and Custom of England and the Laws of OUR said Province, Saving to us OUR Amerciaments and other things to us thereupon belonging. For WE have Commanded OUR-Sheriff of the said District that at certain Days and places which you or any three of you (of whom WE will that you the said William Dummer Powell be one) shall make known within and for the space of Six Calendar Months from the day of the Date of these Presents he cause to come before you or any three of you (of whom WE will that you the said William Dummer Powell be one) such and so many Good and Lawful Men of his Bailiwick (as well within liberties as without) by whom the truth of the Premises may be the better inquired of and known

AND KNOW YE further that WE have also Constituted and assigned you or any three of you (of whom WE will that you the said William Dummer Powell be one) OUR Justices the Gaol of OUR said District of the Prisoners in the same being for this time to deliver. AND therefore WE command you that at a certain Day which you or any three of you (of whom WE will that you the said William Dummer Powell be one) shall appoint you do meet at Detroit, OUR GAOL of OUR said District to deliver, and to do thereupon what to Justice may appertain, according to the Law and Custom of England and the Laws of OUR said Province. SAVING TO US OUR Amerciaments and other things to us thereupon belonging. For WE have Commanded and hereby Command OUR Sheriff of OUR District of Hesse that at a certain Day which you or any three of you (of whom WE will that you the said William Dummer Powell be one) to him shall make known, all the Prisoners of the said Gaol and their attachments before you or any three of you (of whom WE will that you the said William Dummer Powell

be one) there he cause to come. IN TESTIMONY whereof WE have caused these OUR Letters to be made Patent and the Great Seal of OUR said Province of Quebec to be hereunto affixed. WITNESS OUR Trusty and Wellbeloved GUY LORD PORCHESTER OUR Captain General and Governor in Chief of OUR said Province. AT OUR CASTLE of Saint Lewis in OUR City of Quebec this Twentieth Day of January in the year of OUR LORD One thousand seven hundred and ninety one and of OUR REIGN the Thirty-first.

(Signed) D.G.

(Signed) Geo: Pownall, Sec'y.

SOME REFERENCES TO NEGROES IN UPPER CANADA.

BY THE HONOURABLE WILLIAM RENWICK RIDDELL, LL.D., F.R.S.C., ETC.

The report to the Lieutenant-Governor of Upper Canada by Chief Justice William Dummer Powell dated Niagara, 25 September, 1821, contains the following:—

“In the Western District [the Assize Town of which was Sandwich] an indictment for a Riot disclosed certain transactions which may affect the general peace of the district.

“It appears that runaway slaves from the United States receive great encouragement from the inhabitants of that quarter; and are residents there in great numbers, cultivating for Hire or on Shares excellent Tobacco equal to the growth of the Ohio or the Mississippi. The protection afforded by our laws to the personal freedom of all who live in the Province without offence induced a number of slave owners to employ an active agent to recover their property and this agent failing in many attempts to seduce his victims into the Territory of the U.S. engaged assistance, crossed the Streight in the night and attacked a house in Sandwich occupied by runaway negro slaves. The riot and panic occasioned by this attack created alarm and the assailants fled to their boats; but in the course of the day one of the principals ventured to cross again, was recognized, made prisoner and indicted.

Upon the fullest conviction he was sentenced to fine, imprisonment and the pillory. It is said that the owners purpose a Deputation to his Excellency, the Lieutenant-Governor, for relief on failure of which application is to be made to the Government of the U. S.”

Such an application was made, accompanied with a complaint against the Chief Justice's charge to the Grand Jury. He transmitted to His Excellency a copy of his charge which was to the effect that kidnapping was a serious offence but an attempt at kidnapping, which was unsuccessful, could be punished only as an aggravated assault. (Canadian Archives, Sundries, U.C., 1821). Of course the indictment for a riot was at the common law.

Perhaps the most interesting of all the papers in that series is the following petition:

To His Excellency Sir Peregrine Maitland Knight, Commander of the most Honourable Military Order of the Bath, Lieutenant-Governor of the Province of Upper Canada, and Major General Commanding His Majesty's Forces therein, etc., etc., etc.:—

The Petition of Richard Pierpont, now of the Town of Niagara, a man of Color, a native of Africa, and an Inhabitant of this Province since the year 1780. Most humbly sheweth,

That Your Excellency's Petitioner is a Native of Bondon in Africa;—that at the age of sixteen years he was made a Prisoner and sold as a slave; that he was conveyed to America about the year 1760; and sold to a British officer; that he served his Majesty during the American Revolutionary War in the Corps called Butler's Rangers; and again during the late American War in a Corps of Color raised on the Niagara Frontier.

That Your Excellency's Petitioner is now old and without property; that he finds it difficult to obtain a livelihood by his labor; that he is above all things desirous to return to his native country; that if His Majesty's Government be graciously pleased to grant him any relief, he wishes it may be by affording him the means to proceed to England and from thence to a Settlement near the Gambia or Senegal Rivers, from whence he could return to Bondon.

Your Excellency's Petitioner therefore humbly prays that Your Excellency will be graciously pleased to take his case into your favorable consideration, and order such steps to be taken to have him sent as to Your Excellency may seem meet; or to afford him relief in any manner Your Excellency may be graciously pleased to order.

And Your humble Petitioner as in duty
bound will ever pray
his
RICHARD X PIERPONT.
mark

York, Upper Canada,
21st July, 1821.
A true Copy,
James FitzGibbon.

Adjutant General's Office,
York, 21st July, 1821.

I do hereby certify that Richard Pierpont, a man of color, served His Majesty, in North America, during the American Revolutionary War, in the Provincial Corps called Butler's Rangers.

I further certify that the said Richard Pierpont, better known by the name of Captain Dick, was the first colored man who proposed to raise a Corps of Men of Color on the Niagara Frontier, in the last American War; that he served in the said corps during that War, and that he is a faithful and deserving old Negro.

N. COFFIN,
Adjt. Genl. Militia,
Upper Canada.
Upper Canada Sundries (1821).

It does not appear what was done on this petition; but that a Negro Corps was raised at Niagara during the war of 1812 is certain, e.g., there is in 1821 a petition by the widow of Peter Lee, who had been "a private soldier in a colored corps raised by Captain Robert Runchey . . . in the course of the late war, he received an . . . injury to his shoulder."

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AN OLD PROVINCIAL NEWSPAPER.

BY THE HONOURABLE WILLIAM RENWICK RIDDELL, LL.D., F.R.S.C., ETC.

One S. P. Hart, in 1836, during the troublous times before the Rebellion, started in Belleville a small newspaper called the *Plain Speaker*. One account says:

"It was friendly to the rebels, and the editor was put in Kingston Penitentiary for attempting a raid on a bank at Cobourg. The soldiers (volunteers) afterwards marched to the office of the *Plain-Speaker*, upset the type fonts and trailed the manager in the snow and slush. This movement occurred because the paper appeared one morning with the British coat-of-arms turned upside down in its columns."¹

In 1838, after the fiasco of a rebellion at Toronto, Hart began to publish at Cobourg a newspaper with the same name—the first number appearing June 5—of which there were at least thirteen issues. The only number I have seen is Vol. 1, No. 13, of Tuesday, August 28, 1838²: to me as an old resident of Cobourg, it has proved very interesting and I propose in this paper to give some account of it.

This No. 13 is a quarto of four pages, paged 49 to 52—the paper and ink are both good and the proof-reading is fair.

On the first page appears the announcement:—"The *Plain Speaker*, devoted to the diffusion of News, and the Advancement of Agriculture, Commerce, Domestic Manufactures and Science in general will be published every Tuesday Evening, at the Trades' Printing Office, Corner of Main³ and First Street.

By S. P. Hart.

"Terms—Town subscribers and those who call at the office for the paper will be charged Two Dollars, when sent by mail Three Dollars. No paper will be forwarded except the money accompany the order. All letters must be post paid.

Advertisements will be inserted at reduced prices and with few exceptions no advertising will be continued above a month."

The remainder of the first page and part of the first column of the second is taken up with an instalment of a continued story, "The Conscript Brothers."

Then follows the editorial, "Who compose the Producing Classes"—the animus of the editor is abundantly manifest throughout. He writes:—

¹ Belden's *Atlas of Hastings and Prince Edward Counties*, Toronto, 1878, p. iii—I have no means of verifying the story.

² Kindly loaned to me by Mr. James Mitchell, the Assistant Archivist of Canada, stationed at Goderich.

³ "Main Street" sometimes printed "the Main Street," was King Street.

"The Mechanic . . . all those labourers who exercise their physical powers whether they hold the plough, swing the axe, shove the plane, shoulder the hod, throw the shuttle, trail a net or follow any of the various avocations which supply the comforts and necessities of life and contribute to increase the wealth of the community are Producers and 'eat their bread by the sweat of their brow.'"

But "others . . . who wallowing in luxury call themselves the 'Professional Class' . . . pretending to exalted excellence, superior endowments, great personal worth and deep knowledge . . . arrogate to themselves the right of *governing* and directing all the affairs of the Province, of telling people what to think and how to act . . . lovers of *exclusive privileges* . . . high sounding titles . . . given to base lucre and . . . very much intoxicated with power . . . are not the Producing Class in any other sense than this—they produce discord—engender strife—create rebellions—foster disease and fatten upon the miseries of their fellow creatures."

After the editorial, we find printed in parallel columns accounts of two visits—one by Governor Ritner of Pennsylvania, to a farm near Northumberland, Pa., and the other by Governor Arthur,⁴ to Cobourg, Thursday, Aug. 23, 1838. The Pennsylvania Governor had cradled in the harvest field having "pulled off his coat, jacket, shoes and stockings," whereas the Canadian had received "a hole and corner address read to him by Sheriff Ruttan, and a humble mechanic was very much maltreated by the bystanders because he refused to take off his hat in respect to the man who disregarded the prayers of thirty thousand of the men⁵ whom he is sent a distance of 4,000 miles to govern and the earnest petition of heart broken wives and daughters. He left town Friday morning cheered by the Office keepers and Sycophants and the boarders of the *Caroline*. The industrious farmer, mechanic and labourer reserving their three 'hearty huzzas'⁶ for a *Farmer Governor*."

Then follows an editorial item.

"The Farmer, Mechanic, and labourer" are called upon to unite their energies and "with a long and a strong pull and a pull altogether, bring down those who are hanging upon their shoulders and eating up their substance."

This, of course, is sheer balderdash—there was no question of economic tyranny, all that was complained of was political. But we have matter not unlike in certain publications at the present time, some openly Bolshevik, some under other more or less specious names.

⁴ Sir George Arthur, Lieutenant-Governor of Upper Canada, March 23, 1838, to February 9, 1841.

⁵ Sir George Arthur had refused to commute the sentence of death pronounced on Lount and Matthews for High Treason, though petitions for clemency numerous signed were presented to him—one signed by over 5,000 persons was personally presented to him by the wife of Lount, who went on her knees and begged her husband's life—in vain.

⁶ A quotation from the account of the American Governor's visit.

The same sort of thing is seen in an item on Rev. A. N. Bethune, ⁷ and the prefix "Reverend," "the greek word, Aidesimos is used in that language for *reverend* and signifies *awful, venerable, respectable, reverend, compassionate, pitiful*. Either of these titles appended to A. N. Bethune would appear ridiculous in the extreme, particularly if that of *pastor* be added."

The horrors of slavery are recalled by half a column of advertisements in U. S. papers of runaway negroes.

Hart seems to have intended to remove to Belleville again, as a letter to "Monsieur Plain Speaker," says that he in the paper of Aug. 21, had stated that he was going to Belleville, and an item at the bottom of page 3, reads: "We are going to leave Cobourg, and a good many are following our example, some going East, some West, some North, some South. Mr. Joseph Wood goes to Whithy, where he intends to continue the Mercantile business on the Cash system."

An item on page 3 gives us the information: "The N. Y. *Albion*, says that Henry Boulton, 'has been *sacrificed* to the Radicals.' The meaning of this is, he has been dismissed from office upon the petition of the Reformers of Newfoundland; and what is very just, the expenses of removing him are saddled upon him."

This was Henry John Boulton, who had been Solicitor General of Upper Canada, tried for murder ⁸ because he was a second in a fatal duel, acquitted, dismissed from office in 1833, made Chief Justice of Newfoundland, and in 1838, resigned after a quarrel with the Roman Catholic Bishop: he then came back to Upper Canada, and re-entered public life in a quiet way.

Then follows this item from the *Niagara Reporter*:

"A respite has been granted to Chandler, Waite and McLeod, till the 31st inst. George Buck and Murdock McFadden—sentence commuted—Penitentiary. All the rest are to be transported to a penal colony. Jacob Beamer has been found guilty, and sentenced to be hanged on the 31st inst."

These men had been convicted of Treason. Samuel Chandler, Benjamin Waite and Alexander McLeod were transported for life, as was Jacob Beamer; Murdock McFadden got three years in Kingston Penitentiary: George Buck had the same fate.

As indicating the facilities for trans-Atlantic travel in those days, an item from the New York *Commercial Advertiser* is interesting.

The N. Y. *Commercial Advertiser* quotes a letter from Toronto, of Thursday, Aug. 9, containing a statement that the steamer *Transit* had that day arrived from Lewiston, with passengers only 18 days out from England, having arrived in N.Y. by the *Great Western* on Sunday and one of them having remained one day at Oswego on his way up. "Truly this is an age of wonders. . . . To show you

⁷ Dr. Alexander Neil Bethune, born at Williamstown, Upper Canada, 1800, the son of a Presbyterian Minister; he was ordained deacon in 1823, priest in 1824, and was appointed to Grimsby—in 1827 he was appointed to St. Peter's, Cobourg, and in 1841 founded the Theological School in that town. He became Archdeacon in 1846, and second Bishop of Toronto in 1867, dying in 1879 universally respected. He was held in the highest esteem by all classes and creeds during his life in Cobourg; but he was loyal and did not please Mr. Hart.

⁸ See my article "The Solicitor General tried for Murder," 40 Can. Law Times (August, 1920) pp. 636, sqq.

the feeling of people in reference to a trip across the Atlantic, I have this very evening heard perhaps twenty persons say they have made up their minds for a passage in some of the splendid steam-packets in the course of the year. I heard one of the passengers by the Great Western, declare, that he had frequently suffered more inconvenience in crossing our Lake, than he did in his late passage across the Atlantic."

In those days, the traveller went from Toronto to Niagara or Lewiston, then by stage or other conveyance to Albany, then to New York by vessel, or stage—and sometimes taking a week on the way.

The item: "Dr. John Rolph, late M.P.P., is publishing an account of the Revolt," reminds us that Dr. Rolph, fled to the United States on the outbreak of the Rebellion, and lived and practised for some years in Rochester. He received a pardon and returned to Toronto, in 1843, and was still a somewhat prominent feature in political life.

Hart recommended Dobson's Superior ale; his views as to the public houses of the neighbourhood will appear from this article:

"The public houses in the country are conducted as well as can be expected from the support they get. In one particular they are getting more *cute* than formerly.

"Editors should always pass *free*. And on our east tour, many of them refused to take anything from us. Treating us to the best the house afforded, and when we were leaving, slipped the amount of the subscription for the *Plain Speaker* into our hands, with 'don't forget us.'

WE WILL NOT

"Mr. Vanalstine of Grafton, Mr. Ford and Mr. Yarrington, of Colborne, Mr. Ketchum of Brighton, Mr. Harris and Mr. Bullock of Murray are deserving of a liberal support. The Keepers of Public Houses, at the River Trent and Belleville, shall have a chapter to themselves if they behave."

What effect such a recommendation by a bribed editor would have would seem very doubtful.

Taverns are advertised in the newspapers.

E. Shelly's Cobourg Hotel, on the corner of King and Division Streets, "Baggage conveyed to and from the wharf free of charge."

S. H. MacKenzie's North American, "in the immediate vicinity of the Steamboat Landing," from which Hotel "a daily line of stages will be continued to the Rice Lake from whence passengers and baggage will be conveyed to Peterboro."

Other advertisers are George Sutherland, Tailor, who now will sell for cash only so that "GOOD CUSTOMERS shall no more pay for . . . BAD ONES"—W. S. Conger, "one door east of the Albion Hotel," sells groceries, Brandy, Gins, Spirits, Scotch and common Whiskies, Port, Madeira, Tenerife and Sherry Wines, London Porter, Teas, Sugars, Tobacco, Snuff, Crockery and Glass-ware, Stationery (it is called "Stationary"), Salt, Plaster and Ploughs for Cash only.

"Morrison's Pills, the Hygeia Vegetable Universal Medicines"⁹ are advertised by Robert Murray, Agent. Edward Hale had removed his "Stone Yard to the street leading from the main street to the Windmill."¹⁰ W. Gibbons wanted to sell a house and lot on the Main Street, and F. Sprague, to sell or exchange his brick house on Division Street, 38 x 26, quite new, and the lot containing half an acre with a well and a living brook.¹¹

A couple of feeble jokes enliven the journal.

"The weather continues hot and sultry. The butchers of Cobourg kill half an ox at a time."

"A new idea. We understand that an order has passed the Board of Education which provides that Teachers of Common Schools must be able to *read* and *write their own certificates*."

The latter was not much of a libel on the ordinary run of teachers at the time.

And so we leave Mr. Hart, Radical Editor, and his *Plain-Speaker*—a very plain speaker in truth.

⁹ A well-known proprietary remedy of that time—now quite forgotten. Morrison was an Englishman, and founded quite a school of medicine.

¹⁰ I cannot identify the site of the windmill. Hale had a brick yard; and afterwards removed back of Port Hope.

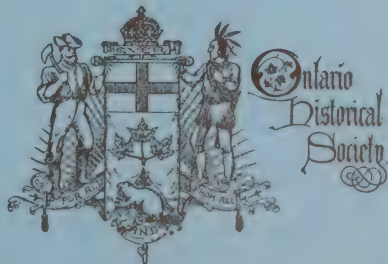
¹¹ I presume Tannery Creek, still very lively at some seasons of the year.

Ontario Historical Society

“Was Molly Brant Married?”

BY

HON. WM. RENWICK RIDDELL, LL.D., F.R.S.C.



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“WAS MOLLY BRANT MARRIED?”

BY THE HONOURABLE WILLIAM RENWICK RIDDELL, LL.D., F.R.S.C., ETC.

“Sir William Johnson . . . married Molly Brant by Indian custom, and later, to legitimize his children under British law, had the marriage sanctioned and celebrated by the Church.”

This passage is found in an official publication by the Province of Ontario.¹ It contains by implication at least two errors and as I think one serious misstatement of fact.

In the first place there is no such thing as “British Law”: there is English law, and there is Scottish law; but they are not the same. The English law is based upon the Common Law of England; the Scottish law, upon the Civil Law of Rome.²

Again it is indicated that if Sir William Johnson married Molly, even upon his deathbed, their previously born children would be legitimized. The different rules of English and Scottish law in that regard are perfectly well known to every lawyer.

As is generally believed, Constantine, on the urgent advice of the higher clergy, made a temporary law that subsequent marriage should legitimize offspring born previously thereto; his successors renewed the law from time to time and it was made perpetual by the Emperor Justinian, in his memorable codification³. The doctrine made its way into most of Continental Europe; and it was introduced into Scotland before the Reformation.

In England, as elsewhere, the Canon Law of the Church took over the principle from the Civil Law; and in 1235, there was a memorable attempt on the part of the Bishops to have it adopted as the Law of England. Parliament met at the Priory of Merton, in Surrey, about nine miles from London and there *In Crasino Sancti Vincentii* (i.e. January 23) was passed the famous Statute of Merton, which confirmed the Common Law rule that for a child to be legiti-

¹ “Thirty first Annual Archaeological Report, 1919 . . . printed by Order of the Legislative Assembly of Ontario,” Toronto, 1919, p. 50. On p. 37 appears the statement concerning Sir William Johnson, “Molly Brant, the sister of Captain Brant, became his housekeeper and later, his wife.”

² Of course, in many matters, especially commercial matters, the rules of the two systems are the same or almost the same; and there is much statutory law which applies to both countries.

³ The object of the law was to put a decorous end to the concubinage widely prevailing, which was looked upon by most as wholly creditable and by the law as semi-marriage.

The law of legitimation *per subsequens matrimonium* was declared by Constantine in a Constitution now lost, renewed by Zeno (Code v. 27.5) and confirmed by Anastasius and Justin (Code v. 27, 6 and 7). Justinian's Code is Code. v. 27, 9 and 11. See the very able and interesting work on Parent and Child by Lord Fraser, a Scottish Judge, 2nd Edition, 1866, p. 32. This work is very accurate and may be confidently relied upon.

mate his parents must have been married before his birth.⁴ When England took possession of the New Netherlands, and New Amsterdam became New York (1664), to the extent that her possession was thoroughly established the law that prevailed was the Common Law of England.⁵

William Johnson came to New York in 1738, and to the Mohawk Valley in the following year, buying his estate "Mount Johnson" in 1741, and finishing his mansion there in 1743. From that time until his death, July 11, 1774, he was domiciled in the Mohawk Valley; and it is quite beyond question that the Common Law was in full force in that part of the Colony of New York. His children by Molly Brant were there born; and under the Common Law the legitimacy of a person was determined by the law of the country in which he was born. The conclusion then is irresistible that a marriage of Sir William upon his death bed to her would be wholly ineffective to legitimize her children.⁶

⁴ *Provisiones de Merton* (1235) 20 Henry III, c. 9, Statutes at Large, Ruffhead's ed. vol. 1, p. 19, Chapter 9 (8 in the Cotton MSS) is worth quoting in full for its quaint vigor.

"Ad breve Regis de Bastardis, utrum aliquis natus ante matrimonium habere poterit hereditatem, sicut ille qui natus est post, Responderunt omnes Episcopi quod nolunt, nec possint, ad illud respondere quia hoc esset contra formam ecclesiae, Ac rogaverunt omnes Episcopi, Magnates ut consentirent, quod nati ante matrimonium essent legitimi, sicut illi qui nati sunt post matrimonium, quantum ad successionem hereditariam, quia ecclesia tales habet pro legitimis. Et omnes Comites et Barones una voce responderunt, quod nolunt leges Angliæ mutare quæ usitate sunt et approbate." The last clause has been quoted and approved thousands of times—the "Common lawyer" delights in it and considers it one of the most glorious if not the most glorious of all the many splendid declarations of the Parliament of England. But the glory of the "Comites et Barones" seems to be dimmed even in England. Bills for the legitimation *per subsequens matrimonium* in England were introduced in Parliament in 1893 by Walter McLaren, M.P., and later by Joseph King and Dr. Chapple, M.P's; the War prevented anything being advanced in that direction for a time but emphasized the necessity of some action in view of the large number of "War babies." In the present year Nevil Chamberlain introduced a Bill of many sections dealing with Bastardy, one clause enacting legitimation *per subsequens matrimonium*. This particular clause was received favorably by the Government and the House; and it is possible that in another year or two, the change will be made. The change has already been made in many of the United States and in some parts of Australia; and the rule prevails in all Civil Law Countries.

Much information is to be found in Sir Dennis Fitzpatrick's article "Legitimation by Subsequent Marriage." 6 *Journal Comparative Legislation* (1904) p. 22.

The Common Law rule seems doomed with many other Common rules once and for long considered the perfection of human reason.

The Canon Law which adopted the Civil Law principle as early as the twelfth century was applied by the Bishops as part of the Ecclesiastical law certainly down to the Reformation and probably later—Maitland's "Roman Canon Law in the Church of England" (1898) pp. 53 sqq. This was so far effective as to permit an illegitimate to take Holy Orders notwithstanding the stern injunction of Deuteronomy 23:2.

⁵ Except that of course, the Courts recognized the rights which had become vested under the modified Civil Law in force under Dutch possession.

⁶ It was not until 1895 that legislation was passed by the State of New York introducing the Civil Law Rule—See Laws of New York, 1895, Chap. 531, sec. 1 and Laws of New York, 1896, Vol. 1. Chap. 272, sec. 18. The case of *Olmsted v. Olmsted* (1907) 118 App. Div. 69; 190 N.Y. 458; 216 U.S. 386 discusses the law of New York in that regard.

What I believe to be a misstatement of fact is the allegation that Sir William Johnson had a marriage with Molly Brant, "sanctioned and celebrated by the Church."

The main facts of Sir William Johnson's life are wholly beyond dispute. Born in Ireland, in 1715, he came to the continent toward the end of 1737, and arrived in the Mohawk Valley Region in the following spring; he married in 1739, Katherine Weisenberg ⁷ who in the next five years bore him three children. She died in 1745, and he took as a companion, Caroline, daughter of Chief Abraham, Sachem of the Lower Castle Mohawks and consequently a niece of the well-known Chief Hendrick. She bore him three children before her death in 1753.

Within a short period, not more than a year, he took in the same capacity, Mary or Molly Brant, sister of the celebrated Joseph Brant, Thayendanegea, with whom he lived until his death, July 11, 1774, and who bore him nine children. ⁸ Whether anything in the nature of a marriage ceremony took place between them at the beginning of their intimacy, we need not enquire. There may have been something of the kind, but it certainly was not such as anyone considered a marriage binding in law. Molly Brant, of course, considered herself his wife, "in Indian fashion," and must be held ethically and morally innocent of wrong.

There are three stories of a legal marriage. The first is given currency by Jephth R. Simms in his "Frontiersmen of New York," Albany, 1882, Vol. 1, p. 205. The author speaks of certain memoranda by Henry Frey Yates in a communication to his son, Bernard F., and proceeds: "With reference to this woman, says the memoranda of Yates, 'It is true that Sir William was married to Molly according to the rites of the Episcopal Church but a few years before

⁷ The contemptuous reference to Johnson's wife by Parkman, "Montcalm and Wolfe," Vol. 1, p. 298, "Here presided for many years a Dutch or German wench whom he finally married" is unworthy of that eminent writer. He is rather more courteous in his "Conspiracy of Pontiac," Vol. 1; at page 95 he says: "Johnson supplied the place of his former (Irish) love by a young Dutch damsel who bore him several children; and, in justice to them, he married her upon her death-bed." The story of this alleged death-bed marriage will be spoken of later in this article.

⁸ It is not unlikely that he had other and less creditable liaisons of a temporary or occasional character with women, white and Indian. If half the gossip of the neighborhood was true he should have required to enlarge "Johnson Hall" to the dimensions of the Palace of old Priam—*Quinquaginta illi thalami, spes tanta nepotum*—for the old commentator tells us "*Liberos habuit ex utroque sexu duos ac sexaginta e variis ux-
oribus.*" While current stories attributed to Sir William the fatherhood of over one hundred children.

In a fairly common and well known work, "Trappers of New York or a Biography of Nicholas Stoner and Nathaniel Foster; . . . and some account of Sir William Johnson and his style of living, By Jephth R. Simms . . . Albany, J. Minsell, 78 State Street, 1860," we find it stated on p. 44 that:

Sir William was "on very intimate terms with the Woodward girls, but the most so with Susannah after she became a grass widow—at which time she was about twenty years old" and that he had one or the other as "an agreeable companion for the night," adding a somewhat salacious anecdote. There is no mention of Molly Brant by Simms.

The date of his first association with Molly Brant is very uncertain—different writers give it as about 1746 (Stone, Max Reid), 1754 (Buell), 1759 (Griffis) &c. &c. It is quite immaterial to the present enquiry and I do not pursue the question.

his death. The Baronet feeling his life drawing to a close and abhorring living longer in adultery, to quiet his conscience privately married Molly to legitimize his children by her, as he had done those by the German girl, who was the mother of Sir John and his sisters.'”

This story is quite obviously incorrect at least in detail. Johnston made his will, afterwards properly proved, in January, 1774, much less than a year before his death; and in it speaks of Catharine as his wife, whose remains were to be beside his own, but Molly he calls his housekeeper, and her offspring his “natural” children. It is impossible that she could have been so described had the marriage ceremony been performed between them.

That story failing, it is asserted that the marriage took place on his death-bed;⁹ but it is well known that while he had been suffering from dysentery for some time, his death was sudden and unexpected. On July 11, 1774, he made a long and impassioned speech to a number of Indians, Iroquois for the most part, a speech which lasted nearly two hours and called for great mental and physical exertion; shortly after the close of the speech he was stricken with cerebral hemorrhage which resulted in his death within two hours of the termination of his speech. He had no time to think of marriage; and Joseph Brant, Molly’s brother, to whom his last words were addressed, and who assisted to carry the stricken Baronet into Johnson Hall, never said or suggested that any marriage was solemnized or spoken of.

Then the story is told that it was after the will and a short time before his death that he had the ceremony performed.¹⁰ To quote again from Simm’s “Frontiersmen of New York,” *ut supra*; “Among the few who witnessed the ceremony of the Baronet’s second marriage, which is said, instead of years, to have been but a short time before his death and after his will was drawn, the memoranda names Robert Adams, a merchant of Johnstown, and Rebecca Vansickler. To the last he accredits his authority . . .” The utter improbability of this story must strike everyone. If Johnson from any feeling of decency and regard for his companion, made her his wife he certainly would have seen to it that the fact was placed beyond all controversy. He would never have let the will stand which sharply distinguished his wife from his concubine, when a short codicil would make everything clear. The woman had lived long enough among the Whites to know the magic virtue of “marriage lines,” and would treasure her marriage certificate. In a word there would be some written evidence at some time, and even if by chance or accident that should be destroyed, there would be some account of it somewhere. Not a scrap of anything approaching evidence or anything but the merest gossip has ever been produced.

⁹ Phelps & Graham, 1852 p. 72. “A legal marriage took place when Sir William was on his death bed, which ceremony had reference to the descent of property.”

¹⁰ In Ketchum’s “History of Buffalo,” Buffalo, N.Y. 1864, at p. 126, occurs the note “It is said he was married to Molly Brant, a short time before his death according to the rites of the Protestant Episcopal Church, in order to legitimize his children by her.” No authority is given.

The strongest kind of negative evidence is, however, available, which would destroy even a *prima facie* case if such were made out—and that evidence is furnished by the records in the Canadian Archives at Ottawa.

She was held in the highest respect by the authorities in Canada and looked upon as a valuable ally: if she had been married to Sir William, she would have been Lady Johnson and would have been spoken of as Lady Johnson—she never was.

The children of Johnson by his wife, Katharine, were by no means prejudiced against her but rather the contrary—and the same is true of the whole family connection—they never speak of her except as Molly Brant, or some similar name, never Lady Johnson.

Colonel Daniel Claus, who married Anne (Nancy), daughter of Johnson by his first wife Katharine, became a prominent officer in Canada—he must have known of the marriage of Molly if there was one. We find him writing officially to Sir Frederick Haldimand from Montreal, August 17, 1779:

"Sir John (Johnson) and I arrived here Saturday morning. . . . As soon as Molly Brant heard of my arrival, she paid me a visit and gave me a full detail of her adventures and misfortunes since the Rebellion began, but in particular in the Fall of 1777, after our Retreat from Fort Stanwix, when she was insulted and robbed of everything she had in the world by the Rebels and their Indians . . .

"She had a pointed conversation in publick Council at Canadusegy reminding him [i.e., the Headman of the Senecas], of the former great friendship and attachment which subsisted between him and the late Sir William Johnson, whose memory she never mentioned without tears in her eyes, which affects the Indians greatly . . . They promised henceforth truthfully to keep their engagements with her late friend the Baronet, for she is in every respect considered and esteemed by them [i.e., the Indians], as Sir William's Relict, and one word from her is more taken notice of by the five Nations than a thousand from any white man." ¹¹ (Claus goes on to speak of her great influence among the Indians and her indisposition to leave her mother and other Indian relatives on Haldimand's invitation).

In another letter from Montreal, September 6, 1789, Claus says: "Miss Molly, since hearing of the movement of the Indians, is very anxious to return among the Six Nations, and says that her staying away at this critical time may prove very injurious to her character hereafter, being at the head of a Society of Six Nations, who have a great deal to say among the young men in particular in time of war." ¹²

To this Haldimand replied from Quebec, September 9, 1779, "As to Miss Molly, if she thinks her presence necessary above, she must be suffered to depart. Col. Johnson will of course provide for her journey and give her whatever Presents may be necessary." ¹³

¹¹ Can. Arch., Haldimand Papers, B. 114, pp. 63 seq.—the letter is more fully quoted in Buell's "Sir William Johnson," New York, 1903, pp. 267, 268.

¹² Can. Arch., Haldimand Papers, B. 114, pp. 68 seq.

¹³ Can. Arch., B. 114, p. 70.

And Claus, September 13, 1779, informs Haldimand that "Miss Molly" accompanied a band of twenty Mohawks he was sending to join Captain Fraser.¹⁴

April 23, 1781, Haldimand reports to Powell, "representations from Miss Molly."¹⁵

Three months later, July 26, 1781, Claus writes to Haldimand from Montreal, "Mrs. Mary Brant has been here for some days and yesterday set off for Carleton Island again, taking away her son George and Susan and Mary, two of her daughters, who were here at schools near two years. Margaret, another sister, left this place about a year ago. The schoolmaster tells me the girls sufficiently read and write English and the boy to my knowledge has greatly improved in that respect. . . . At Molly's leaving she entreated me to offer her most sincere and hearty respects and thanks to His Excellency. . . . She seemed to be happy in her children's improved state. . . . There are left at school two of Brant Johnson's children, whose mother is daily expected to take them away; the eldest a fine genius and great arithmetician. . . ."¹⁶

Col. Matthews, answering from Quebec, July 30, 1781, says: "His Excellency is pleased to find his intention to the education of Miss Molly's children has so well succeeded and that she appears sensible of the Benefit they have received, it being His Excellency's wish as well on account of the Regard he bore the late Sir William Johnson as to reward the services of Her Family, to show her every friendly attention in his power."¹⁷

On May 27th, 1783, Haldimand writes from Quebec to Sir John Johnson: "In consideration of the early and uniform fidelity, attachment and zealous services redereed to the King's Government by Miss Molly Brant and her family, I have thought fit to settle on her a yearly pension of £100 currency"¹⁸ More important still, Haldimand wrote on the same day to Captain Joseph Brant that he had granted a pension of £100 to "Mrs. Molly Brant" for the zealous services of herself and her family.¹⁹

¹⁴ Can. Arch., B. 114, p. 71.

¹⁵ Can. Arch., B. 104, p. 212.

¹⁶ Can. Arch., B. 114, p. 192.

Colonel Daniel Claus had been Deputy Superintendent of Indians from 1761: he was married to Anne (Nancy) elder daughter of Sir William Johnson: Col. Guy Johnson to Mary, the younger.

¹⁷ Can. Arch., B. 114, p. 195.

¹⁸ Can. Arch., B. 115 p. 116. Sir John Johnson had been from March 14, 1782, and was at this time Superintendent General and Inspector General of Indians by Royal Commission—he so remained until the office was abolished, March 25, 1828: he had succeeded his cousin and brother-in-law Col. Guy Johnson, who was suspended on certain charges, February, 1782. Sir John was absent from Canada in England leaving Canada September, 1792, and not returning until October, 1796. The ship "*Lady Johnson*" sailing with articles for the use of the Indians as mentioned in Haldimand's letter to Sir John Johnson from Quebec, June 14, 1784, Can. Arch., Hald. Papers B. 63, pp. 407 sqq. was called after the wife of Sir John.

Haldimand was about the time of the granting of the pension insisting on the reduction of the expenses of the Indian Department—see e.g. his letter to Sir John Johnson from Quebec, January 26, Hald. Papers, B. 63, p. 57.

¹⁹ Can. Arch., B. 105, p. 358.

November 1, 1784, Haldimand made a standing order that the houses to be built at Cataraqui for Joseph Brant and "Mrs. Mary Brant" were to be considered entirely their property.²⁰

In official correspondence within a few years after Johnson's death by and between persons who would be expected to know of her marriage if a marriage had taken place, the Governor and all concerned spoke of her as Molly Brant—the Governor to her brother more formally as Mrs. Mary Brant and at no time is there the slightest suggestion that she was really Lady Johnson.

Perhaps of even more importance is the fact that Joseph Brant, who was pressing the claims of the Indians and of his own family never suggests a marriage, and if negative evidence could be conclusive the fact that at least twice claims were urged upon the Administration by her or on her behalf²¹ and not one word is said to indicate that she was other than a person who had been a wife only according to Indian custom.

Then we have the proceedings before Colonel (afterwards Major-General) Thomas Dundas and Mr. Jeremy Pemberton, Special Commissioners on the claims of the United Empire Loyalists.²²

Sir John Johnson, in 1788, appears as a witness on "the claim of the Children of Mary Brant": and, "says that Mary Brant has received Compensation for her own losses"—he gives evidence concerning Elizabeth, Magdaline, Margaret, George and Mary—and Peter deceased—there being, he says, "Seven of the children now alive"²³—Peter Warren Brant, the eldest, being dead.

And "Mrs. Mary Brant" appears as a witness some months afterwards.²⁴

Now all this is negative evidence of course: it is proverbially difficult to prove a negative and it would yield to even a small amount of positive evidence. What positive evidence is there?

We have seen that Simms in his "Frontiersmen of New York," asserts the fact positively: he repeats the story in a letter dated at Fort Plain, N.Y., November 20, 1877—he there said that he had not seen the Yates MSS, for many years, that Bernard F. Yates was dead but that he, Simms, had talked with old Mr. Yates, then an old man 30 years ago, who "expressed himself as believing what I stated . . . about Sir William marrying Mary Brant—the few years perhaps should have been a few months or even days but I gave full credence to his story as

²⁰ Can. Arch., B. 64, p. 382.

Other letters about this time referring to her are to be found B. 114, p. 63 "Molly Brant" (Claus to Haldimand) B. 114, pp. 66, 70, 115 "Miss Molly" (Haldimand to Claus): B. 114, pp. 68, 71. "Miss Molly." (Claus to Haldimand)

²¹ See B. 104, p. 212; B. 114, p. 63.

²² The commissioners came to Canada and took the evidence in person; this was contained in a number of volumes of manuscript which were retained by Col. Dundas and after his death in 1784 were sold by his family to the American Government. A full copy has been printed in a very convenient form by the Ontario Archives as *Second Report* (1904).

²³ Sitting of Commissioners at Montreal, March 3, 1788. Rep. (1904) p. 472.

²⁴ 2 Ont. Arch. Rep. (1904), p. 472. Susanne and Anne are not mentioned. There is a somewhat amusing error in the indexing of this volume p. 1384. "Kingsland" is taken for the first name of one of Molly's children instead of the name of a place.

²⁴ August 30; 2 Ont. Arch. Rep. (1904) p. 383.

he informed me he had the facts of his marriage from a credible witness present—nor was he the only one who told me of the same marriage to Miss Brant.”²⁵ Hearsay upon hearsay without document or probability. There are some fugitive statements made early in the last century to the same effect, but there are quite as many or more to the opposite.²⁶

My own enquiries go back some years: I have traced several positive assertions to their source and have always found that there was no foundation for the story.

²⁵ Draper MSS., State Historical Society of Wisconsin, 13 F. 175—the letter is from J. R. Simms to L. C. Draper, Esq.

²⁶ From the Draper MSS., I select the following: I F 98 (2) “Mrs. Grant who was for many years a resident of Albany and intimate with Sir William Johnson, says, “After the decease of Lady Johnson, Sir William married Mary, the sister of Brant, by whom he had several children, three girls of which afterwards married Colonels in the Army.” But in her entertaining book, “Memoirs of an American Lady,” she says that Sir William “connected himself with the daughter of an Indian Sachem, who . . . whether ever formally married to him according to our usage or not, continued to live with him in great union and affection all his life.” See John Ross Robertson's Diary of Mrs. Simcoe, p. 247. Kirby, in a letter from Niagara, September 9, 1889, says, “She was not married to Sir William by English form of marriage,” Draper MSS. 11 F. 207. Draper MSS. 14, F. 100 (5) “They were never legally married though such a statement has been made.”

I quote also works more or less generally known: William Elliot Griffis, “Sir William Johnson and The Six Nations” . . . New York, Dodd, Mead and Company, Publishers, n.d., at p. 21 speaks of “Catharine, a daughter of a German Palatine settler named Weissenberg or Wisenburg,” and says in a note, “The local gossip and groundless traditions like those set down by J. R. Simms are in all probability worthless”—and indeed “groundless traditions” are generally “worthless.” Griffis says “Kate was the only woman with whom he lived in wedlock.” He truly says that “no record of the marriage ceremony has yet been found,” and suggests that they were married by “some one of the Dutch or German clergymen of the Valley as is most likely,” or if not, by the Rev. Thomas Barclay, an English Episcopal Minister at Fort Hunter. Griffis says that when the bones of Johnson were disturbed in 1862, a plain gold ring was found inscribed on the inside “June 1739.16” and suggests that that date was that of his marriage to his own lawful wife.

P. 22 “of Molly Brant, his late mistress, he spoke and wrote as his housekeeper: of the Palatine German lawfully wedded to him, as his beloved wife.” Of Molly Brant Griffis says, p. 180, that she “was undoubtedly a woman of ability and with her Johnson lived happily. . . .”

P. 206 “Mary Brant, though not only an Indian but a Mohawk Indian, in spirit was to her dying day in the old English and Hebrew sense of the word a virtuous woman.”

Augustus C. Buell, “Sir William Johnson” New York, D. Appleton and Company, 1903 pp. 16, 17 speaking of Katherine, “daughter of Jacob Weisenburg, a Lutheran clergyman,” says, “in 1739 . . . he married her; the ceremony, according to Mr. Max Reid, was performed by the Rev. Mr. Barclay, rector of Queen Anne's Chapel at Fort Hunter,” p. 45: “Late in 1745, his white wife Katherine died suddenly . . .” leaving three children. p. 48: “In the fall of 1747 he astonished all his friends by employing a young Indian woman as housekeeper . . . not Mary Brant . . . Caroline, daughter of Chief Abraham, Sachem of the Lower Castle Mohawks,” a niece of Hendrick, who had three children by him and died giving birth to the third in 1753. About a year after he offered his protection and affection to Mary Brant. She accepted and outlived him, they lived together twenty years, 1754-1774: she bore him nine children, two boys and seven girls, but one of the latter died in infancy.

Buell discredits the romantic story of Mary Brant's first introduction to Johnson and says Johnson had known her from the time she was ten years old.

Not long after Caroline's death (p. 57) “the arrangement was made by which Mary became the mistress of his household.”

p. 59 “the baronet lived in a morganatic fashion with two Indian women at different times.”

For example I have within the year been positively assured of the existence at Albany of written proof of the alleged marriage: On enquiry made of the gentle-

p. 46 (n) Buell properly rebukes Parkman "Wolfe and Montcalm" vol. 1, p. 298, for saying "Here presided for many years a Dutch or German wench whom he finally married."

p. 52 quotes Reid that Johnson married neither Indian girl.

Stone in his "Life of Joseph Brant—Thayendanegea, New York, 1836, vol. 1, p. 18, says that about 1748 "Johnson employed as his housekeeper, Mary Brant, or Miss Molly as she was called, a sister of the celebrated Indian Chief, Thayendanegea with whom he lived until his decease and by whom he had several children."

Note I: "That Molly Brant was not the wife of the baronet is finally proved by his last will in which after desiring to have the remains of his beloved wife Catherine interred beside him he speaks of the children of my present housekeeper, Mary Brant" as his "natural children." It is, however, but justice to Molly Brant to state that she always regarded herself as married to the baronet after the Indian fashion."

Stone in his "Life of Joseph Brant—Thayendanegea," New York, 1836, vol. I p. 18, quotes from Mrs Grant's daughter's book, "Memoirs of an American Lady," chapter 39, that "the Indian maiden whether ever formally married to him according to our usage or not continued to live with him in great union and affection all his life."

No suggestion of a marriage is made in this work.

W. Max Reid, "The Mohawk Valley" . . . New York and London, 1901—quotes Griffiths' "Life of Sir William Johnson"; gives the date of Johnson's first association with Miss Molly as more nearly 1746 (with Stone), than 1759 (with Griffiths), but while quoting Simms "Frontiersmen of New York" on another matter, he says nothing of an alleged marriage.

E. M. Chadwick: "Victorian Families," Toronto, 1894, p. 67, under the heading "Brant" "Mary, or Molly as she was usually better called (died 1805) who became the second wife of Sir William Johnson Baronet (died 1774)." But on communicating with my old friend and former partner, Major Chadwick informs me:—

"In reply to yours of 29th ult., I do not think Sir William Johnson was ever married to Molly Brant according to white man's law but she was certainly his wife according to Indian custom. You will notice that the children (daughters) of this marriage were fully recognized socially, for they all married persons socially prominent." Letter, Toronto, October 1st, 1920.

In the Parliamentary Library of Canada there formerly was a MSS. quarto volume of 347 pages, with additions of 9 and 14 pages, entitled "Canadian Letters, Descriptive of a Tour thro' the Provinces of Lower and Upper Canada in the course of the years 1792 and 1793." (the author's name is not given and the volume is now lost).

"Captain Brant had a sister at Cataragui who was known by the name of Miss Molly. Sir William Johnson left some children by this squaw with whom he had cohabitated for many years. They are, I believe, with the exception of one son, all daughters. Sir William bequeathed handsome fortunes to the whole family. The Misses Johnson are married respectably in the country. It is with regret that I have heard, since my return to England, of the death of the eldest, Mrs. Kerr. For many minute attentions which in Colonial life are highly valuable to the passing or unsettled stranger, I have now to lament that from this event I must ever remain indebted." Draper MSS, F, 193.

Appleton's Cyclopædia of American Biography:

Sir William Johnson, bart., b. 1715; d. 1774.

"In 1739, he married Catherine Wisenburgh, daughter of a German settler on the Mohawk, who died young leaving three children, a son, John, who was knighted in 1765, and two daughters, Anne and Mary, who married respectively, Col. Daniel Claus and Col. Guy Johnson. Sir William never married again. He had for some years afterwards many mistresses, both Indian and white, and one of his earlier ones, a German, has been the probable cause, from being confounded with his wife, of the erroneous statement that has been made that none of his children were legitimate. Mary, or as she is generally called "Molly" Brant the sister of Thayendanegea or Joseph Brant, the Mohawk sachem, whom later he took to his house, and with whom he lived happily till his death, has sometimes been termed his wife; but they were never married. He had eight children by her, whom he provided for by his will, in which he calls them his 'natural children.'"

man ²⁷ said to be in possession of it, he stated that he had made considerable enquiry but that he had never seen anything of the kind. About the same time I was informed that an Indian Chief of Caledonia ²⁸ had seen at Johnstown, N. Y., a wedding ring given to Miss Molly by Sir William Johnson, in the possession of a Historical Society there. Enquiry disclosed the fact that the ring was one given by the Baronet to his wife, Catharine Weisenberg, and is in the Historical collection at Johnson Hall; no record of any marriage ceremony has ever been heard of.

Nothing is known of the supposed marriage in the Libraries of Congress, at Washington, of Parliament at Ottawa, of New York, of Boston, of Buffalo, in the Archives at Ottawa and at Toronto, in the Indian Department of the Dominion, or in any place at which I have thought it possible that a record might be found, and I have neglected no known or suggested source of information. ²⁹

The story of the deathbed marriage perhaps had its origin in that of the marriage on her deathbed to Catharine Weisenberg, a curious story with some semblance of evidence which deserves to be more carefully examined. The state-

²⁷ Dr. Arthur C. Parker, Archæologist of the State of New York, Albany, N.Y., who has Indian blood in his veins.

²⁸ Chief W. D. Loft, Caledonia, Ontario. *ex relatione* A. G. Chisholm, Esq., Counsel for the Six Nation Indians: my information as to the fact is from the Reverend Wolcott W. Ellsworth, Rector of St. John's Church, Johnstown, N.Y.—his letter is dated from Johnstown, N.Y., October 27, 1920.

Another story coming from modern Indian sources is that the Rev. John Stuart married Sir William to Miss Molly at the Mohawk Village, in 1770; but this was long before his death (1774), and consequently the story is morally impossible.

²⁹ I copy here a letter from an acknowledged authority, Dr. James Sullivan, State Historian of the State of New York.

"September 27, 1920.

"Hon. Mr. Justice Riddell,

"Supreme Court of Ontario, Osgoode Hall,

"Toronto, Canada.

Dear Sir,—

"Up to the present time there has been absolutely no documentary evidence in any form presented to show that Sir William Johnson was married to Molly Brant. In his will, which was drawn up in 1774, he speaks of her as his housekeeper, and certainly if he were married either by regular marriage ceremony prevailing in Christian countries, or even by an Indian rite, he would not have thus spoken of her in his last will and testament.

"We know that various persons have persisted in spreading, or starting rumours to the effect that Sir William Johnson was married to Molly Brant. The most recent of these that this office has tried to run down was one appearing in the *Oneida Despatch* for November 21, 1919. This was given on the authority of DeWitt C. Haddock, who said that he had in his possession a diary of his grandfather, Daniel Haddock, the contents of which bore witness to the fact that Sir William Johnson had been married to Molly Brant, in July, 1769. The newspaper article was such a tissue of misstatements and inaccuracies that on the very face of it no credence could be placed on it. We immediately got into communication with Mr. Haddock and he promised to let us see this diary. Three letters written to him subsequent to such promise have failed to bring any results whatsoever and we believe that the whole thing is a fake.

"These rumours, as you know, are started by a certain kind of person whose moral sense is somewhat shocked by the fact that Sir William Johnson cohabited with Molly Brant, and they therefore try to hatch up some sort of marriage ceremony to make the thing appear highly moral according to a 19th century code."

"Very truly yours,

"JAMES SULLIVAN."

ment that there was a marriage at all seems to be the creation of some who imagined that there was something improper or degrading in the union—improper and degrading it may have been in the man, only the narrow-minded or uncharitable can see impropriety or degradation in the woman. From her own point of view and that of her people, she was a pure and faithful wife, fit to stand before Kings, a virtuous woman whose price was far above rubies. And so it is to Johnson's credit that he always treated her with respect and insisted that others should do the same.

The following copied by me from the original, seems to settle the matter at least as to Peter Johnson, one of the sons of Molly Brant. Why, or for what purpose the affidavit was taken does not appear. John Ray was a prominent citizen of New York.

"City of New York, to wit. Alexander Ellice of London, in the Kingdom of Great Britain, merchant, at present residing in the City of New York, being duly sworn deposeth and saith that he was personally acquainted with Peter Johnson, the natural son of Sir William Johnson, Baronet, deceased, by Mary Brant, his house-keeper; that the said Peter Johnson entered the British Army as an Ensign and for some time in the year of Our Lord one thousand seven hundred and seventy-six sailed with the said army for America, where he died or was killed some time in that year or the year following; that the said Peter Johnson never married to the knowledge of this deponent, and this deponent verily believes died without leaving any lawful issue, and further his deponent saith not.

(Signed) ALEX^r ELLICE"

Sworn this fourth day of March, 1795,
before me, John Ray, M. Ch'y.

Extract from *Magazine of American History*. Volume VI. 1880.

**Some Origins
of the
British North America Act, 1867**
by
William Renwick Riddell LL. D., Sc.

Some Origins of "The British North America Act, 1867."

By WILLIAM RENWICK RIDDELL, LL.D., etc., Justice of the
Supreme Court of Ontario.

(Read May Meeting, 1917.)

"The British North America Act, 1867"¹ with its few amending Acts may be called the written Constitution of Canada.

This "Constitution" is of very great consequence indeed in our national life: but it plays by no means the important part played by the Constitution of the United States in that country. It is not so elaborate or minute; it does not affect to exhaust the rules of government, but leaves much to the feeling for freedom and justice supposed to inhere in our people.

The difference between the Americans and us enters into the very terminology:

"The word 'Constitution' carries with it a different connotation in English and American usage, and we in Canada follow the English. In our usage the Constitution is the totality of the principles more or less vaguely and generally stated upon which we think the people should be governed: in American usage the Constitution is a written document containing so many words and letters which authoritatively and without appeal dictates what shall and what shall not be done. With us anything unconstitutional is wrong no matter how legal it may be; with the American people anything unconstitutional is illegal however right it may be—with the Americans anything which is unconstitutional is illegal, with us to say that a measure is unconstitutional rather suggests that it is legal but inadvisable."²

Accordingly when any proposed measure is under consideration, it is very seldom that the Act, the written "Constitution" needs to be looked at.

But as it lays down the broad lines of our system, the Act deserves careful attention: and it is a matter of some interest—it may be of some value—to enquire into its origins.

¹ 30-31 Vict., C. 3 (Imp.)

² The Dodge Lectures, No. 2, Yale University, March 6th, 1917: "The Constitution of Canada." In *Bell v. Burlington* (1915) 34 O.L.R. 619 (Appellate Division of the Supreme Court of Ontario) at p. 622, I discussed this terminology.

The Statute sets out with the statements that:

"The Provinces of Canada, Nova Scotia, and New Brunswick, have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom;"

and that "such a Union would conduce to the welfare of the Provinces and promote the interests of the British Empire."

Of course these but follow Resolution 3 of the Conference of Delegates at Quebec, October 10th, 1864.

"3. In framing a Constitution for the General Government, the Conference with a view to the perpetuation of our connection with the Mother Country and the promotion of the best interests of the people of these Provinces desire to follow the model of the British Constitution so far as our circumstances will permit."¹ While it is nowhere specifically so enacted, there can be no doubt that the unwritten principles of the British Constitution were intended to govern the new Dominion, and that Canada should have "a Constitution similar in principle to that of the United Kingdom."

This had not always been the case—in the first period of the Constitutional History of Canada, that of French Sovereignty, and in the second, that of military rule (1760-1763), there was nothing of such a Constitution as was enjoyed by the Kingdom of England or of Great Britain.

When in 1763,² the King issued his Royal Proclamation and formed the Governments of Quebec, East Florida, West Florida and Grenada, it was stated therein that the Governors would be directed to "summon and call General Assemblies within the said Governments" "by and with the Advice and Consent of our Council": and that the Governors with the consent of the Council and Assembly should make laws and ordinances for the Government. In the Commission³ to General James Murray as "Captain General and Governor in Chief in and over our Province of Quebec", he was commanded to act "with the advice and consent of the Council and Assembly of our said Province" after these bodies had been formed in accordance with his Instructions. The Instructions⁴ directed him to call a

¹ "Parliamentary Debates on the subject of Confederation.....Printed by Order of the Legislature, Quebec....., 1865." at p. 2.

² October 7th, 1763. The Proclamation will be found in Shortt & Doughty's "Documents Relating to the Constitutional History of Canada 1759-1791," (Report Canadian Archives for 1907—Sessional Paper No. 18, 1907) pp. 119 sqq.

³ Shortt & Doughty, pp. 126 sqq. November 21st, 1763.

⁴ Shortt & Doughty, pp. 132, sqq. December 7th, 1763.

Council to be composed of the Lieutenant Governors of Montreal and Trois Rivières, the Chief Justice of the Province, the Surveyor-General of Customs for the Northern District of America (all Imperial appointments) and eight to be chosen by himself from amongst the most considerable of the inhabitants or persons of property of the Province. These were to be approved by His Majesty under His Signet and Sign Manual: and vacancies were to be filled in the same way from persons whose names were to be transmitted by the Governor. As soon as the situation and circumstances of the Colony should permit, he was to call a General Assembly of the Freeholders of the Colony.

It is plain that a "Constitution" not dissimilar to that of the Mother Country was in contemplation; but minute directions were given as to the form of legislation, and the members of the proposed Assembly were prevented from "assuming to themselves Privileges in no ways belonging to them."

For reasons unnecessary here to detail (but well-known) it was thought impracticable to summon an Assembly; and this first proposed "Constitution" fell to the ground. There was some excuse for Thomas Townshend, M.P.¹ saying that the government was in fact despotic.²

A new period began when the Quebec Act of 1774³ came into force (May 1st, 1775)—notwithstanding the vigorous efforts of the Opposition, Townshend, Dunning,⁴ Colonel Barré,⁵ (who knew for a fact that the principal people of Canada "take a liking to assemblies")

¹ This was Thomas Townshend, Jr., (1733-1800), son of the Honourable Thomas Townshend, Teller of the Exchequer. He had been Lord of the Treasury in Rockingham's Administration, and Joint Paymaster in the Pitt-Grafton Administration, but resigned in 1768. At the time the speech spoken of in the text was delivered, May 26, 1774, he was in Opposition: he was afterwards Rockingham's War Secretary and Shelburne's Home Secretary and was created Baron (and afterwards Viscount) Sydney.

² This language is given in Hansard, Vol. XVII, p. 1357—in another and in some respects a better report the words do not occur: "Debates of the House of Commons in the Year 1774. . . . drawn up from the Notes of the Right Honourable Sir Henry Cavendish, Bart., . . . London, Ridgway, Piccadilly MDCCCXXIX."

³ 14 George III, C. 83. Shortt & Doughty, pp. 401 sqq.

⁴ John Dunning (1731-1783) Solicitor-General (1768-1770), was now in opposition: but in 1782, he joined the Ministry as Chancellor of the Duchy of Lancaster, and was created Baron Ashburton. He was a very able lawyer and wrote with clearness and effect: his speeches read well, too.

⁵ Colonel Isaac Barré (1726-1802) served under Wolfe at the taking of Quebec where he was dangerously wounded (he is to be seen in West's picture of the Death of Wolfe). He was Vice-Treasurer of Ireland in Lord Chatham's Administration (1766), but most of his life was in Opposition.

and "think they have as good a right to have assemblies as any other colony on the continent")¹ Sergeant Glynn,² Charles James Fox³ (who urged that it was not right for Britain "to originate and establish a constitution in which there is not a spark or semblance of liberty" and protested against the proposal to "establish a perfectly despotic government contrary to the genius and spirit of the British Constitution")⁴ and Burke⁵ (who objected to the "despotic Council")⁶ the Bill was passed. The Attorney-General,⁷ thought it absurd that Canada should have her sovereignty divided between the Governor, Council and Assembly; that, he thought, would be making Canada an Allied Kingdom totally out of the power of Britain "to act as a federal union if they please and if they do not please to act as an independent country—a federal condition pretty much the condition of the States of Germany."⁸ Sir Guy Carleton, Governor-General of Canada, being examined before a Committee of the House of Commons said that the Canadian inhabitants were not desirous of having Assemblies in the Province—"Certainly not."⁹

The Quebec Act provided for the government of Canada by Governor and Council without Assembly, and the British Constitution was ignored.

But many English-speaking immigrants came in from the United States after the Peace of 1783, and it was decided to divide the Province into two: this was done by Royal Prerogative, but the government and constitution of the two Provinces, Upper Canada and Lower Canada were prescribed by Act of Parliament, the Canada Act or Constitutional Act¹⁰.

¹ "Debates etc. . . . Cavendish, etc." See note 2 on p. 73.

² John Glynn (1722-1779) Serjeant-at-Law, Recorder of London, described by Lord Chatham as "a most ingenious, solid, pleasing man and the spirit of the Constitution itself."

³ The well-known politician whose life was in great measure devoted to liberty.

⁴ "Debates etc. Cavendish, etc.," pp. 61, 62.

⁵ Edmund Burke.

⁶ "Debates etc. Cavendish, etc.," p. 93.

⁷ Edward Thurlow afterwards Lord Chancellor Thurlow.

⁸ "Debates etc. Cavendish, etc.," p. 36.

⁹ "Debates, etc. Cavendish, etc.," p. 105. "Very much the Contrary", 17 Hansard, p. 1368.

¹⁰ The division of the Province of Quebec into two provinces, i.e., Upper Canada and Lower Canada, was effected by the Royal Prerogative: but 31, Geo. III., c. 31, the celebrated Quebec Act, provided the form of Government, etc. The message sent to Parliament expressing the Royal intention is to be found copied in the Ont. Arch. Reports for 1906, p. 158, 28 Hansard, p. 1271. After the passing of the Quebec Act, an Order-in-Council was passed August 24th, 1791 (Ont. Arch. Rep. 1906, pp. 158 *seq.*), dividing the province of Quebec into two provinces and under the

By this time there was a great change in the official view as to the proper form of government for Canada.

In moving for leave to introduce this Bill in the House of Commons Pitt, with almost his first word, said that it was proposed to give the Colonists "all the advantages of the British constitution"¹ In the extraordinary debate on the Bill lasting five days², Fox said that the Bill held out to Canadians something like the shadow of the British constitution, but denied them the substance.³ Burke could not keep away from his *bête noire*, the French Revolution, and had to be called to order more than once, but he urged that not "the bare imitation of the British constitution" should be given, but "the thing itself."⁴ He said that "it was usual in every Colony to form the government as nearly upon the model of the Mother Country as was consistent with the difference of local circumstance."⁵ With Fox he urged that the "constitution, deservedly the glory and happiness of those who lived under it, and the model and envy of

provisions of sec. 48 of the Act directing a Royal warrant to authorize the "Governor or Lieutenant-Governor of the Province of Quebec or the person administering the government there, to fix and declare such day as they shall judge most advisable for the commencement" of the effect of the legislation in the new provinces, not later than December 31st, 1791. Lord Dorchester (Sir Guy Carleton) was appointed, September 12th, 1791, Captain-General and Governor-in-Chief of both provinces and he received a Royal warrant empowering him to fix a day for the legislation to become effective in the new provinces (see Ont. Arch. Rep. 1906, p. 168). In the absence of Dorchester, General Alured Clarke, Lieutenant-Governor of the Province of Quebec, issued, November 18th, 1791, a proclamation fixing Monday, December 26th, 1791, as the day for the commencement of the said legislature (Ont. Arch. Rep. 1906, pp. 169-171). According technically and in law, the new Provinces were formed by Order-in-Council, August 24th, 1791; but there was no change in administration until December 26th, 1791.

¹ 28 Hansard, p. 1377.

² It was in this Debate that the historic rupture took place between Burke and Fox: even in the dry pages of Hansard, the human interest stands out. It is, indeed, hard for us a century and a quarter afterwards, thoroughly to understand the causes of the quarrel; if there was no more than appears on the surface, it is difficult for us moderns to understand why a difference, largely theoretical, of opinion on the French Revolution should cause a severance of friendship. The Debate is reported in 29 Hansard, pp. 103-113: 359-430.

³ 29 Hansard, p. 110.

⁴ 29 Hansard, p. 366: Burke was called to order by the well known Michael Angelo Taylor (afterwards the Father of the House) p. 369, by St. Andrew St. John (afterwards Lord St. John) pp. 370, 374, by Mr. (afterwards Sir) John Anstruther (afterwards Chief Justice of Bengal) p. 371, but Pitt came to his rescue p. 375—then Charles Grey (afterwards the second Earl Grey, Viscount Howick) again called him to order p. 385.

⁵ 29 Hansard, p. 403. ¹

the world should be extended.as far as the local conditions of the Colony.should admit."¹

Seventeen years before, the Attorney-General Thurlow had thought it absurd to give Canada a Constitution at all like that of Britain—now every one believed that the Colony should have a Constitution as like that of the Mother Country as possible. Fox thought the new Constitution not democratic enough, but all thought it like that of Britain—as, indeed, it was on paper.

In the House of Lords, Lord Grenville said: "Our Constitution. . . the envy of every surrounding nation—they are now about to communicate the blessings of the English Constitution to the subjects of Canada because they (i.e., the Lords) were fully convinced that it was the best in the world"—and there was no dissent.²

In Upper Canada for example we find when the first Parliament of Upper Canada met at Newark (Niagara-on-the-Lake), Monday, September 17, 1792, His Excellency the Lieutenant-Governor, Colonel John Graves Simcoe, in the Speech from the Throne, said to the members of the Legislative Council and Legislative Assembly:

"I have summoned you together under the authority of an Act of Parliament of Great Britain passed in the last year and which has established the British Constitution, and also the forms which secure and maintain it in this distant country.

"The wisdom and beneficence of our Most Gracious Sovereign and the British Parliament have been eminently proved, not only in the imparting to us the same form of Government, but also in securing the benefit of the many provisions that guard this memorable Act; so that the blessings of our invaluable constitution thus protected and amplified we may hope will be extended to the remotest posterity. . . ."

Both Houses made a most loyal address in answer, that of the Council following closely the wording of the speech from the Throne.

In his Speech from the Throne closing this Session, Simcoe said that the Constitution of the Province was "the very image and transcript of that of Great Britain."³

¹ The words are those of Fox p. 414, but Burke says the same thing in effect.

² 29 Hansard, pp. 656, 657.

³ The Speech from the Throne and the Answers will be found in the Seventh Report of the Bureau of Archives, Ontario, 1910, pp. 1-3; Sixth Report of the Bureau of Archives, Ontario, pp. 2-3. The closing speech is on pages 11 and 18 respectively.

From the very beginning of the two Provinces of Canada it was considered that the Constitution was the "very image and transcript" of that of Great Britain; and most of the conflicts between Governors and Parliament, and between the two Houses of Parliament arose from the contention that the British Constitution was not followed in the government of the Canadas.

Had the unwritten principles of the Constitution of Great Britain been observed in the government of the two Provinces, much of the subsequent trouble would have been avoided; but as we know, they were not. It is not necessary to discuss the conflicts ultimately culminating in the Rebellions of 1837-8—disputes arising in most cases from the Lower House insisting on Responsible Government, the Responsibility to them of the Administration as in the British constitutional practice. Lord Durham in his celebrated Report points out that in all the North American Provinces, there was a striking tendency to a struggle between the Government and the majority, "that the natural state of government in all these Colonies is that of collision between the executive and the representative body"—this he considers as "to indicate a deviation from sound constitutional principles or practice" and looks upon the conduct of the assemblies "as a constant warfare with the executive for the purpose of obtaining the powers inherent in a representative body by the very nature of representative government." Dealing with the system in vogue wherein the Governor claimed that he was in no way responsible to the people's representatives in his administration of the government, Lord Durham says: "The real advisers of the Governor have in fact been the Executive Council; and an institution more singularly calculated for preventing the responsibility of the acts of Government resting on anybody can hardly be imagined"; and he adds the pregnant truth "a professedly irresponsible government would be the weakest that could be devised."

He comes to the conclusion that "It needs but to follow consistently the principles of the British constitution and introduce into the Government of these great colonies those wise provisions by which alone the working of the representative system can in any country be rendered harmonious and efficient", and his panacea is "administering the Government on those principles which have been found perfectly efficacious in Great Britain;" he "would not impair a single prerogative of the Crown.....but the Crown must.....submit to the necessary consequences of representative institutions... It must carry on the Government.....by means of those in whom that representative body has confidence."¹

Lord John Russell on introducing Resolutions in part based upon Lord Durham's Report, (June 3, 1839) said it was intended to form a union of the Canadas "by which a representative constitution

¹ I employ the useful edition of Lord Durham's Report published by Methuen & Co., London, 1902—the extracts are from pp. 50, 51, 76, 204, 205, 220; the whole Report well repays reading even now.

may be carried into effect", but he adds: "It does not appear to me that you can subject the Executive Council of Canada to the responsibility which is fairly demanded of the Ministers of the executive power in this country"—the difficulties which he points out are, however, Imperial and not local. He repeated that "It was not wise to lay down as a principle that the Canadian constitution or any colonial constitution should be an exact copy of the British Constitution."¹

In view of the strong opposition to the Resolutions, they were withdrawn and leave was asked and given to bring in a Bill: this was not pressed to a second reading. But the next year the Bill was again introduced and this time it was passed.² It is true that Lord John Russell says, that the Colonial "Assembly put forward claims inconsistent with our monarchical form of government" and is "not of opinion that the official servants of the Governor should be subject to exactly the same responsibility as the Ministers in this country" but he thinks "it will be necessary without any positive enactment (for it would be impossible to introduce such a provision into the Bill), but by the rule of administration which will be established by the Union, that the Assembly should exercise a due control over the officers appointed or kept in office by the Governor, and over the distribution and expenditure of the public funds"—"that the Colonial administration should be made to act in union with the House of Assembly, as the House of Commons in England did with the Government."³

Charles Butler who knew more about Canada and its needs than any other in the House said that: "The Union of Canada carried responsible government with it as a natural consequence."⁴ William Ewart Gladstone opposed the Bill because he thought "Responsible government meant nothing more than an independent legislature."⁵; John Campbell Colquhoun because: "Responsible government would be incompatible with the maintenance of Colonial Government" and that "the people while they called for responsible government were only anxious to throw off all connexion with British Govern-

¹ 47 Hansard, 3rd series, pp. 1263, 1268, 1269, 1270, 1287.

² The well known Union Act.

³ 52 Hansard, 3rd Series, pp. 1332, 1333, 1345.

⁴ 54 Hansard, 3rd Series, p. 734. Charles Butler was a Liberal politician, a pupil of Thomas Carlyle, graduated at Trinity College Cambridge, became M.P. in 1830, Secretary to Lord Durham when made Governor-General of Canada 1838 and credited with being responsible for much of Durham's Report—a man of high standing and a voluminous writer.

⁵ 54 Hansard 3rd Series, p. 743. Gladstone was then a High Tory: Home Rule had not yet entered into his heart to conceive.

ment."¹ The Duke of Wellington entered a protest on the Record of the House of Lords with many reasons (27 in all) the most important being No. 26. "Because the Union . . . will tend to augment the difficulties attending the administration of the Government, particularly under the circumstances of the encouragement given to effect the establishment in the United Province of a local responsible administration of Government."² Lord John Russell at length explained his meaning by saying: "When an Assembly considered that certain institutions and objects would be for the benefit of the country, and . . . these objects were not incompatible with imperial interests . . . it must be the height of folly not to accede to their wishes. . . . on the other hand, he never could admit that where the dignity of the Crown was concerned and the interests of the country were involved, any opinion of a Colonial Assembly was to overbear the opinion of the United Parliament."³

It is plain from the views of friend and foe that the Bill was expected to give full Responsible Government on the British model in all local, non-imperial, matters.

Some few adjustments had to be made after the Union, but the Bill was fairly effective.

It is not without interest to note that the British North America Act 1867 as originally drafted had as its Preamble: "Whereas the Union of the British North American Colonies for Purposes of Government and Legislation would be attended with great benefits to the Colonies and be conducive to the Interests of the United Kingdom." (Sir) John A. Macdonald (with his own hand) changed this in the second draft (23 January, 1867) so as to read: "Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to form a Federal Union for the purposes of Government and Legislation based on the principles of the British constitution and whereas such Union of the British American Colonies would be attended with great Benefits to the Colonies and be conducive to the Interests of the United Kingdom."⁴

(Consult the Memorandum on p. 97 *infra* for an explanation of the Drafts and Conferences.)

In the third draft (2nd February, 1867), it reads:

"Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to form a Federal Union under

¹ 54 Hansard 3rd Series, p. 745. Colquhoun was a miscellaneous writer of no great importance. He was M.P. 1832-47.

² 55 Hansard 3rd Series, p. 666.

³ 54 Hansard 3rd Series, p. 751.

⁴ See Sir Joseph Pope's "Confederation". Toronto, The Carewell Co., 1895. Inset at beginning of volume, pp. 140, 158, 177, 212, 248.

the British Crown for the purposes of government and legislation, based upon the principles of the British Constitution." The fourth draft has the same words: and, it was not until the Revise of 9th February, that the Preamble appears as in the Act passed.

It seems to me that the amendment made by Macdonald was so made to show that the Union was the act of the Colonies themselves not a gift, good or bad, of the Imperial authorities: the Preamble as finally settled indicates the two cardinal principles, which have characterized Canada from the beginning: the fixed determination to remain a part of the British Empire and the equally fixed determination to govern herself. This is true Canadianism.

The decision to have a Federal and not a Legislative Union as suggested by Lord Durham¹ was come to at a very early stage of the Quebec Conference: all the Delegates from Canada, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland agreed in this decision.

The Preamble to the British North America Act proceeds: "It is expedient that provision be made for the eventual admission into the Union of other parts of British North America."

The Union of all British North America had been many times recommended—perhaps, the most notable of the recommendations was that of William Smith, Chief Justice of Quebec, in a letter to Lord Dorchester².

Lord Durham had also suggested a "Legislative Union over all the British Provinces in North America. A general and responsible Government. . . a general Legislative Union" which "would elevate and gratify the hopes of able and aspiring men."³ Many others of more or less note had made the same suggestion: and even at Charlotte-town at the first Conference and at Quebec at the second, it had been hoped that Prince Edward Island and Newfoundland would come into the Union.

¹ "On my first arrival in Canada, I was strongly inclined to a federal union. . . . I thought that it would be the tendency of a federation. . . . gradually to become a complete legislative union. . . ." But he changed his mind. "I believe that tranquillity can only be restored by subjecting the Province to the vigorous rule of an English majority; and that the only efficacious government would be that formed by a legislative union." Report, pp. 226, 227. It cannot be said that the Union of the Canadas was a failure; but undoubtedly the present Federal Union is preferable—in any case a Legislative Union could not have been formed.

² See Can. Arch. Q 44, 1, p. 61: Kingsford's Hist. Can., Vol. VII, pp. 310-312. A very full account will be found in the Life of William Smith in Dr. Anson Phelps Stokes' Yale University Volumes.

³ "Report" pp. 229 (the word "Legislative" is here misprinted "Legislature") 231.

In 1865, and again in 1866, Prince Edward Island by her Legislature in emphatic terms refused to enter into the proposed Union; Newfoundland also declined. Canada, New Brunswick and Nova Scotia sent delegates to England for the necessary legislation by the Imperial Parliament. Prince Edward Island was again invited to join and its representative, the Premier¹, then in London, was favourably impressed with the terms offered; but on his return home, his government was defeated. The entry of Prince Edward Island into the Union was not effected until 1873.

Section 3 authorizes the formation of a "Dominion under the name of Canada." The "Quebec Resolutions" speak of a "Federal Union": the name "Kingdom of Canada" appeared in an early draft of the Act, but "Dominion" was substituted for "Kingdom" by the Foreign Secretary, Lord Stanley, from regard to the supposed Republican susceptibilities of the United States. The fear that the United States would object to the style "Kingdom" was so far as is known wholly baseless and it is not too much to say, it was absurd².

Section 5.—"Canada shall be divided into four Provinces, named Ontario, Quebec, Nova Scotia and New Brunswick." The names Upper Canada, Lower Canada, Nova Scotia and New Brunswick are found in the Rough Draft of Conference, and the first and second Draft of the Act, but in the third Draft appear the names as at present.³

The provisions as to Executive Power call for no particular remark — they simply systematize and formulate constitutional practice.

Section 17—"There shall be one Parliament for Canada, consisting of the Queen, an Upper House called the Senate and the House of Commons."

¹ The Premier was Hon. James C. Pope, afterwards a Member of Sir John Macdonald's Administration.

Delegates from both Prince Edward Island and Newfoundland attended and took an active part in the Quebec Conference. The Government of Prince Edward Island declined to accept the proposed terms. The Government of Newfoundland would have accepted them, but could not carry the people.

² In the "Rough Draft of Conference" at London, the name is left blank; in the first Draft of the Bill "such name as His Majesty thinks fit": in the third "Kingdom of Canada"; as also in the fourth. In the Revised Draft of 9th February appears "One Dominion under the name of Canada." Pope, "Confederation," pp. 123, 142, 159, 160, 181, 213.

³ Pope "Confederation," pp. 123, 142, 159, 160. "Quebec" was the name of the "Government" constituted by the Royal Proclamation of 1763 including the present Quebec, Ontario and a great deal more: Ontario is of course named from the Great Lake: New Brunswick was separated from Nova Scotia in 1784.

At a very early stage of the Quebec Conference the Resolution was unanimously adopted: "That there shall be a General Legislature for the Federated Provinces composed of a Legislative Council and Legislative Assembly"—this terminology was not persisted in, as we find Hon. George Brown within a week thereafter speaking of the "House of Commons" and on the revision of the Resolutions the language employed in the Report of the Delegates was "a Legislative Council and a House of Commons." The Upper House continued to be called the Legislative Council; but by the third Draft of the Act,¹ "Senate" was given as a name to the Upper Chamber to distinguish it from the Legislative Councils of the Provinces as well as to give it greater dignity.

The name "House of Commons" involved a principle. From the very beginning of Colonial Government the Assemblies had more or less vigorously claimed the same rights and powers as the Imperial House of Commons.

When Murray received instructions to call a General Assembly, he was told that "the Members of several Assemblies in the Plantations have assumed to themselves Privileges in no ways belonging to them, especially of being protected from Suits at Law during the term. . . . And some Assemblies have presumed to adjourn themselves at Pleasure without leave from our Governor first obtained, and others have taken upon them the sole framing of Money Bills refusing to let the Council alter or amend the same."—and he was instructed to prevent such practices.² No Assembly was in fact called under these instructions: disappearing under the Quebec Act of 1774, the Assembly reappears under the Canada or Constitutional Act of 1791—and thereafter continuously the Assemblies kept pressing their claim to be Houses of Commons: not infrequently using the name. The Union Act of 1840 still used the name Assembly; but by 1867, there was no longer any doubt of the true position of the popular House, and it received its true name. It was left to the Canadian Parliament to define its own "privileges, immunities and powers" so long as these did not exceed those of the House of Commons at Westminster.

When the very small part played in Canadian public life by the Senate is considered, it is interesting to see what a large part of the time of the Quebec Conference was taken up in the question of the composition etc., of the Upper Chamber. It was quite early decided to form Divisions for the purpose of the Upper House: 1. Upper

¹ Pope, "Confederation," pp. 10, 19, 20, 39, 123, 142, 160.

² Shortt & Doughty, *Const. Docs.*, 1759-1791, pp. 136, 137.

Canada, 2. Lower Canada, 3. Nova Scotia, New Brunswick and Prince Edward Island—these three Divisions to have an equal representation of 24 each, and to the Island of Newfoundland additional representation was to be allotted: but much difference of opinion arose as to the manner of selecting them. Some were in favour of electing the members, some of allowing each Division to choose its own method; but at length all agreed that the Members of the first Upper Chamber should “be appointed by the Crown at the recommendation of the Federal Executive Government upon the nomination of the respective Local Governments, due regard being had to the claims of . . . the opposition in each Province so that all political parties be as nearly as possible equally represented”—and to be nominated from the existing Legislative Councils if possible.¹

Prince Edward Island withdrew and Nova Scotia and New Brunswick took the 24 Senators allotted to the Maritime Division, 12 to each. The first draft of the bill proposed to name the members, but the third and subsequent drafts left it open to appoint any person. An understanding, however, had been reached as to who should be appointed.

The Legislative Councils in Upper and Lower Canada had been appointive as the Council was in United Canada till the Act of 1856, which made it elective.² Sir John Macdonald at the Quebec Conference, while he did not admit that the elective principle had been a failure in Canada, thought they should return to the original principle; no one seems to have contested the proposition and the nominative system was unanimously approved.³ No one suggested that the position of Member of the House should be hereditary: the power in that regard given by the Act of 1791 early disappeared from our Constitution, never having been acted upon.⁴

¹ Pope, “Confederation”, pp. 12, 13, 14 (Oct. 17th, 1864) 18, 58, 64-66, 100, 143.

² 19-20 Vic. C. 140 (Can.)

³ Pope, “Confederation,” p. 58.

⁴ (1791) 31 George III C. 31 S. 6. “.....Whenever His Majesty, His Heirs or Successors shall think fit to confer upon any subject . . . by Letters Patent under the Great Seal of either of the said Provinces, any Hereditary Title of Honour, Rank or Dignity of such Province descendible . . . it shall . . . be lawful for His Majesty, etc., etc., to annex thereto . . . an Hereditary Right of being summoned to the Legislative Council of such Province . . .” Fox objected to this (29 Hansard, p. 107) “It seemed to him peculiarly absurd to introduce hereditary honours to America, where those artificial distinctions stunk in the nostrils of the natives.” Pitt (do. p. 112) thought “An aristocratical principle being one part of our mixed government . . . it was proper that there should be such a Council as was provided by this Bill and which might answer to that part of the British constitution which composed the other House of Parliament.” Fox (do. p. 411) thought the Councillors should be elected (p. 113) that “in the Province of Canada, the introduction of

Section 26 gives power to the Governor General, when the Queen should on his recommendation think fit to direct that three or six Members should be added to the Senate, to add the said number of Members accordingly.

This provision appears for the first time in the third draft of the Bill, which in Sec. 16 provides that if the Council reject a Money Bill of the Commons or reject three times any other Bill, then if the Bill has been carried by a majority of votes from two of the three Divisions, Her Majesty might add Members to the Senate, observing the equality between the three Divisions. Of course this was by analogy to the House of Lords, and was intended to meet local factious opposition. In the fourth draft it was provided that on the application of the Government of Canada Her Majesty in Council might sanction an appointment of additional Members not exceeding 18, and in the fifth draft the clause appeared as in the Act.

The tenure of office for life was early proposed by (Sir) John A. Macdonald and the proposition does not seem to have met opposition.¹ This had been the tenure in Upper and Lower Canada and in United Canada till 1856.²

Section 34 gives the Governor General, i.e., the Government, the power to appoint the Speaker of the Senate—this is by analogy to the Lord Chancellor at Westminster; the like provision appears in the Canada Act of 1791³ and the Union Act of 1840.⁴

Sec. 36 provides that the Speaker may vote and that on an equality of vote, the decision is deemed to be in the negative—this also comes from the House of Lords. It was agreed at the Quebec Conference that the Speaker should have no vote except a casting vote, but this was changed to the present rule in the third draft of the Bill.⁵

In the Act of 1791, it was provided that the Speaker of the Council (or Assembly) should have a casting voice "in all cases where the voices shall be equal"⁶ in the Union Act of 1840 the Speaker of

nobility was peculiarly improper." but Pitt (p. 415) "laid great stress on the circumstance of the hereditary honours being derived from the imperial crown of Great Britain which he considered as a matter of peculiar value": and the Section passed—to remain a dead letter.

¹ Pope, "Confederation," pp. 162, 184, 217.

² Pope, "Confederation," p. 14.

³ (1791) 31 George III, C. 31, S. 12.

⁴ (1840) 3 and 4 Vict., C. 35, S. 9 (Imp.).

⁵ Pope, "Confederation," pp. 41, 100, 126, 146, 163 (The third Draft is "The Speaker shall vote as other Members, etc.") 185 (the fourth draft is equally peremptory) 219 (Final Draft same as at present) 255.

⁶ (1791) 31 George III, C. 31, S. 28.

Council had no vote except when the voices were equal; in that case, he had the casting vote.¹

Section 35 provides that the quorum in the Senate shall be at least 15 including the Speaker.

In the Instructions to General Murray, 1763, he was commanded to have a Council of 12, of whom 5 should form a quorum;² the Acts of 1774 and 1791 are silent on this matter and consequently, as at the Common Law, the quorum was a bare majority. The Union Act provided that 10 including the Speaker must be present.³

As was to be expected, the quorum was not fixed at the Quebec Conference: the number is blank but is fixed at 15 in the first draft and so continued.⁴

Section 37 provides for the number of Members of the House of Commons:

| | |
|--------------------|----|
| Ontario..... | 82 |
| Quebec..... | 65 |
| Nova Scotia..... | 19 |
| New Brunswick..... | 15 |

In all..... 181

At the Quebec Conference on motion of Hon. George Brown it was resolved "that the basis of representation in the House of Commons shall be by population as determined by the official census every ten years; and that the number of Members at first shall be 200.

| | |
|---------------------------|----|
| Upper Canada..... | 89 |
| Lower Canada..... | 65 |
| Nova Scotia..... | 19 |
| New Brunswick..... | 15 |
| Newfoundland..... | 7 |
| Prince Edward Island..... | 5 |

that..... Lower Canada shall always be assigned 65 Members....." All the delegates agreed but those of Prince Edward Island—Mr. Haveland saying "Prince Edward Island would rather be out of the Confederation than consent to this motion. We should have no status." Both he, Mr. Palmer, and Mr. Whelan considered that they were in no wise bound by an understanding arrived at at the Charlottetown Conference that the representation was to be by population: Col. J. H. Gray and Mr. Coles, their col-

¹ (1840) 3 and 4 Vict., C. 35, S. 10 (Imp.)

² Shortt & Doughty, p. 133.

³ (1840) 4 and 4 Vict., C. 35, S. 10 (Imp.).

⁴ Pope, "Confederation," pp. 126, 146, 163, 185, 219, 255.

leagues, thought they came to the Quebec conference on that understanding, but the majority stood out against the proposition. Mr. Shea, of Newfoundland, pertinently said "What brought about the conference except the difficulties in Canada over the question of representation by population?"¹

At the time of the Union in 1841, Lower Canada had a population of about 630,000; Upper Canada of about 470,000; but the two parts of United Canada were given an equal number of representatives in the House of Assembly. The Lower Canadians complained of the inequality and justly so—the provision complained of arose from Lord Durham's view that it was necessary to unite the two races on such terms as that the English would be given the domination. He said, "without effecting the change so rapidly or so roughly as to shock the feelings or to trample on the welfare of the existing generation, it must henceforth be the first and steady purpose of the British Government to establish an English population, with English law and language in this Province, and to trust its government to none but a decidedly English Legislature."

As has been elsewhere said:—

"The Upper Province rapidly increased in wealth and population, overtaking and passing the Lower Province by 1850; and many of its public men complained of the provision, formerly favourable to their section, that each part should have the same number of representatives. Representation by Population—"Rep. by Pop.," as it was generally called—became the watchword of the Reform party in Upper Canada.

"As early as 1858 a responsible Minister of the Crown in Canada, Mr. (afterwards Sir) Alexander T. Galt, openly advocated it and moved for the appointment of a committee to ascertain the views of the people of the Lower Provinces and of the Imperial Government. In 1861 Sir John A. Macdonald, while opposing the principle of Rep. by Pop., said that the only feasible scheme as a remedy for the evils complained of was a Confederation of all the Provinces. And at length in 1864 he effected an agreement and a coalition with his strongest political foe, Mr. George Brown, to secure this object.

"The Lower Provinces had in the Session of their respective Parliaments in 1864 authorised the appointment of delegates to discuss and if possible to bring about a Union of the Maritime Provinces, i.e., New Brunswick, Nova Scotia and Prince Edward Island. A meeting of these delegates had been set for September 1, 1864. The Canadians felt that it would be advisable to take advantage of this opportunity;

¹ Pope, "Confederation," pp. 19, 68, 69, 70.

and accordingly eight Members of the Coalition Government of both sides of politics, went to Charlottetown. Prince Edward Island, met the Conference and were asked to and did express their views. The Maritime delegates are understood to have come to the conclusion that a union on the larger basis might be effected. In order that the feasibility of such a Confederation might be discussed and considered from every point of view, the Charlottetown Conference was adjourned; and it was agreed to hold another Conference at Quebec, to be attended by delegates from all the Provinces interested. This Conference met in the Parliament buildings, Quebec, October 10, 1864, and was attended by delegates from Canada, New Brunswick, Nova Scotia and Prince Edward Island; resolutions were adopted which formed the basis of the British North America Act subsequently passed, which established the Dominion of Canada."¹

It was quite beyond question to have Representation other than by Population and so the Quebec Conference decided; certain of the delegates from Prince Edward Island thought their Province had not been fairly treated in the representation in the Upper House, but gave way. In respect of the representation in the Lower House, however, it was said "our people would not be content to give up their present benefits for the representation of five Members." "But," added the speaker "if the Government who found the delegation will take the responsibility on them I may support them."² As we know, the Government of the Island refused to assent to the terms: but she came in a little later with the same number (5) of Members of the House of Commons.

Sections 45 to 49 as to the election, duty, power &c., &c., of the Speaker of the House of Commons are from the practice of the Imperial House of Commons.

No instructions were given on this subject to General Murray in 1763; of course the Act of 1774 did not contemplate a Lower House at all. The Act of 1791 is silent as to the method of election of the Speaker of the Assembly and in fact he was elected by the House, the statute giving him a casting vote when the voices were equal: the

¹ The quotations are from the Dodge Lectures, Yale University, March, 1917. In respect of "Rep. by Pop.," it may be of interest to quote the late Dr. Henry Scadding. In his erudite and very interesting "Errata Recerta" (*Canadian Journal* for May, 1864) he says, p. 14. "In the political arena we see if we do not hear, Rep. by pop." and in a note adds: "To the 'foreign' reader it may be necessary to say that a certain dangerous reef running right across the lake of Canadian politics is thus named. The full form of the appellation is Representation by population—" and a dangerous reef it was for Dr. Scadding's political party.

² Pope, "Confederation," pp. 70, 71. (Hon. Edward Wheelan, M.P.P.).

Union Act provided for his election by the Members of the Assembly and gave him a casting vote when the voices should be equal.¹

This matter was not discussed at the Conference, no reference to it is found in the Report of the Delegates but the practice was so taken for granted that it does not appear in the Regulations at Westminster, 4th December, 1866. The Rough Draft, however, and all subsequent drafts are explicit.²

Section 48 makes twenty, including the speaker, a quorum of the House of Commons.

In the Assembly proposed by the Royal Proclamation of 1763, there was no provision for a quorum—nor in the Act of 1791. As a fact the quorum was fixed, from time to time, by the Assembly itself; the Union Act fixed 20 (including the Speaker), as the quorum.³

The quorum was left blank "exclusive of the Speaker" in the Rough Draft, but is fixed at 20, including the Speaker in the third Draft.⁴

Section 50 prescribes five years as the maximum life of a House of Commons. Murray's Commission (1763) authorized him "When and so often as need shall require to summon and call General Assemblies"⁵ thereby leaving the term in his discretion: the Act of 1791 fixed four years as the maximum,⁶ and in this regard was followed by the Union Act.⁷

When the Constitutional Act of 1791 was introduced, it contained a provision for a septennial Assembly. Fox indignantly said that: "Why they should make such Assemblies not annual or triennial, but septennial was beyond his comprehension. . . . By a septennial bill the people of Canada might be deprived of many of the few representatives that were allowed by this bill. . . . It might be inconvenient for such persons to attend. . . for the term of seven years," although "they might be able to give their attendance for one or even for three years without any danger or inconvenience to their commercial concerns."

Pitt thought "a house of assembly for seven years would surely be better than one for a shorter period," but gave no reasons. The point seems (with many others) to have been lost sight of in the extraordinary quarrel between Fox and Burke; it is not mentioned again

¹ (1840) 3 and 4 Vict., C. 35, SS 33-34 (Imp.)

² Pope, "Confederation," pp. 128, etc.

³ (1840) 3 and 4 Vict., C. 35, S. 34.

⁴ Pope "Confederation," pp. 128, 166, etc.

⁵ Shortt & Doughty, p. 128.

⁶ (1791) 31 George III, C. 31, S. 27.

⁷ (1840) 3 and 4 Vict., C. 35, S. 31 (Imp.)

and it does not appear at what stage the quadrennial term was substituted.¹

The matter passed *sub silentio* in 1840. At the Quebec Conference (Sir) John A. Macdonald moved that the Legislative Assembly should continue for five years—and this was unanimously agreed to. Accordingly the maximum appears in the Report of the Delegates and in all the Drafts².

Section 53. "Bills for appropriating any part of the public revenue, or for imposing any tax or impost, shall originate in the House of Commons."

This is but the formal statement in statutory form of the constitutional principle long recognized in the Mother Country that all grants of money, and all taxation shall be made by the representatives of the people *i.e.*, the House of Commons.³

Murray had in 1763 received definite and specific instructions not to allow the Assemblies intended to be called by him to take "upon them the sole framing of Money Bills, refusing to let the Council alter or amend the same;" the King added: "It is . . . Our further pleasure that the Council shall have the like power of framing Money Bills as the Assembly."⁴

Neither in the Constitutional Act of 1791, nor in the Union Act of 1840 was there any such prohibition; nor was there any Statutory provision as in the B. N. A. Act in which it is inserted apparently *ex abundanti cautela*.

There was little or no discussion in the matter at the Conference, the rule being taken for granted. Mr. (afterwards Sir) Oliver Mowat moved "All bills for appropriating any part, &c." (as in the Section)—there was no opposition and the Section passed unanimously.⁵

¹ 29 Hansard, pp. 106, 112.

² Pope, "Confederation," pp. 20, 43, 102, 128, 165, 189, 223, 258.

³ It is not without interest to note that Charles James Fox objected to the Quebec Act of 1774 (amongst other reasons) because the clause in the Act providing for the accustomed dues of the Roman Catholic clergy was a money measure, and it should not have originated in the House of Lords (as this Bill did); he urged that to allow the Bill to pass would be "in fact, a relinquishment of the annual and hitherto undoubted right of the House of Commons to originate Money Bills." He asked that the journals of the House of Commons of March 5th, 1677 should be read: "And the same being read accordingly, it appeared that they had rejected a Bill from the Lords for the purpose of collecting customary tythes and other dues" for the reason that the Bill should have originated in the House of Commons, 17 Hansard, pp. 1362, 1399.

⁴ Shortt & Doughty, pp. 136, 137.

⁵ Pope, "Confederation," pp. 31, 48, 87, 88, 135, 148, 166, 189, 224, 259.

Section 55 reads: "Where a bill passed by the Houses of the Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion, but subject to the provisions of this Act and to Her Majesty's instructions, either that he assents thereto in the Queen's name, or that he withholds the Queen's assent, or that he reserves the bill for the signification of the Queen's pleasure."

Section 56. "Where the Governor-General assents to a bill in the Queen's name, he shall, by the first convenient opportunity, send an authentic copy of the Act to one of Her Majesty's Principal Secretaries of State; and if the Queen in Council within two years after the receipt thereof by the Secretary of State thinks fit to disallow the Act, such disallowance (with a certificate of the Secretary of State of the day on which the Act was received by him) being signified by the Governor-General, by speech or message to each of the Houses of the Parliament, or by proclamation, shall annul the Act from and after the day of such signification."

Section 57. "A bill reserved for the signification of the Queen's pleasure shall not have any force unless and until, within two years from the day on which it was presented to the Governor-General for the Queen's assent, the Governor-General signifies by speech or message to each of the Houses of Parliament or by proclamation that it has received the assent of the Queen in Council."

In Murray's Instructions (1763), it was provided that no law or ordinance respecting private property should be passed without a clause suspending its operation till His Majesty's pleasure should be known: and also that all "Laws, statutes and ordinances" passed by Governor, Council and Assembly should be transmitted within three months of their passing to the "Commissioners for Trade and Plantations" with the reason for passing them. Until such time as an Assembly should be called, Rules and Regulations not affecting "Life, Limb or Liberty of the Subject" or "imposing any Duties or Taxes" might be passed by Governor and Council, but must be transmitted to His Majesty by the first opportunity for approbation or disallowance.¹ No Assembly having been in fact called, the Governor by the advice of the Council made a number of Ordinances.²

¹ Shortt & Doughty, pp. 135, 136.

² These are now to be found collected in a convenient form in a publication of the Archives of Canada. "Ordinance made and passed by the Governor and Council of the Province of Quebec, 1763-1791, Ottawa....., 1917."

Before the coming into force, May 1st, 1775, of the Quebec Act, 1774, there were 39 Ordinances in all passed by the Governor at Quebec: on their face, they purported to be "ordained and declared" (or "ordained" in a few instances) by the

The Quebec Act of 1774 provided that every Ordinance should be transmitted to His Majesty within six months of its passing for the Royal approbation, and that if disallowed it should cease to have effect from the promulgation at Quebec of His Majesty's Disallowance—no ordinance could be made without the consent of the Governor.¹

In the Constitutional Act of 1791, the provisions are substantially as at present;² and also in the Union Act of 1840.³

On motion of Mr. Mowat, the Delegates at Quebec, unanimously passed the following Resolutions:

"8. Any bill of the General Parliament may be reserved in the usual manner for Her Majesty's assent . . .

"9. Any bill passed by the General Legislature shall be subject to disallowance by Her Majesty within two years as in the case of bills passed by the said Provinces hitherto. . . "

These appear in the same form in the Report of the Delegates, and in the Resolutions of the Conference at Westminster, but in the Rough Draft the present form makes its appearance in substance.⁴

Section 58 Provides for the appointment of a Lieutenant-Governor for each Province by the Governor-General in Council.

At the time of the Conquest of Quebec, there were three administrative Districts in the eastern part of Canada: Quebec, Montreal and Three Rivers. Amherst, in 1760, appointed Brigadier-General Gage Lieutenant Governor of Montreal and dependencies, Colonel Burton, Lieutenant-Governor of Three Rivers and dependencies. Monckton had the previous year before his departure from the Colony appointed General James Murray, Governor of Quebec and Col. Burton, Lieutenant-Governor, and when Amherst took command, Murray continued to act as Governor of Quebec.

When the time came for civil government to be established, it was decided to continue the division into three districts, but to make Quebec the residence of the Governor-in-Chief. It was decided to

Governor "by and with the advice and assistance of His Majesty's Council", or "by and with the advice and consent of His Majesty's Council."—sometimes "Council of the same", or "Council of this Province" is used instead of "His Majesty's Council."

¹ Shortt and Doughty, p. 405.

² (1791) 31 George III, C. 31, SS. 30, 31, Shortt & Doughty, p. 701.

³ (1840) 3 and 4 Vict., C. 35, SS. 37, 38, 39 (Imp.). The "practice of returning colonial laws for their approval in England goes back to the days when Virginia and Bermuda were governed by chartered commercial companies. . . . By the end of the 17th Century the routine of transmitting acts for the Royal approval had become fairly well established. "The Royal Disallowance in Massachusetts" 24 Queen's Quarterly, pp. 338 sqq., by A. G. Dorland.

⁴ Pope, "Confederation," pp. 31, 48, 87, 88, 107, 129, 149, 166, 189, 224, 260.

appoint Murray as "Captain General and Governor-in-Chief": by his Commission he was commanded to administer the prescribed oaths "to the Lieutenant-Governors of Montreal and Trois Rivières" and by his instructions to call to his Council (amongst others) the "persons whom we have appointed to be our Lieutenant Governors of Montreal and Trois Rivières."¹

After the Constitutional Act of 1791, a Governor-General was appointed for all Canada and a Lieutenant-Governor for each Province who had during the absence from his Province of the Governor-General (substantially) all the powers of the Governor-General—the Governor-General was also from and after 1786 Governor of the Maritime Provinces each of which had its own Lieutenant-Governor with the same powers as a Lieutenant-Governor of Upper or Lower Canada. In the Canadas this arrangement came to an end on the coming into force in 1841 of the Union Act, but it continued in the Maritime Provinces until Confederation. All these appointments rested with the Home Administration, and the B.N.A. Act was a departure from the existing practice.

Section 69. "There shall be a Legislature for Ontario consisting of the Lieutenant-Governor and of one House, styled the Legislative Assembly of Ontario."

Section 71. "There shall be a Legislature for Quebec consisting of the Lieutenant-Governor and of two Houses, styled the Legislative Council of Quebec and the Legislative Assembly of Quebec."

Section 88. "The Constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall subject to the provisions of this Act, continue as it exists at the Union until altered under the authority of this Act."

We have seen that until 1792, there were not two Houses of Parliament in Canada, that the Constitutional Act of 1791 provided for a double chamber and that this continued under the Union Act of 1840, and was in force at the time of Confederation. Nova Scotia and New Brunswick also had two chambers.²

¹ Shortt & Doughty pp. 127, 133. There were also officers sometimes called Lieutenant Governors, but more usually Governors of "Detroit and its dependencies" and of Michillimackinack. By the time the Proclamation of 1763 had become effective (August 1764), Col. Burton had succeeded Gen. Gage in Montreal and had himself been succeeded in Three Rivers by Col. Fred. Haldimand, by himself for a time and by Col. Fred. Haldimand again.

² Nova Scotia still has two Chambers as has Quebec: all the other Provinces have one Chamber only. It may be convenient to set out here the course of constitutional development.

Manitoba was organized in 1870 with two Chambers, but she abolished her Legislative Council in 1876 by 39 Vict. C. 18 (Man.).

At the Quebec Conference the Hon. George Brown moved: "That in the Local Government there shall be but one Legislative Chamber"; Mr. (afterwards Sir Leonard) Tilley of New Brunswick objected as did Mr. Fisher and Mr. Chandler of the same Province; Mr. (afterwards Sir Charles) Tupper of Nova Scotia was inclined to agree with Mr. Brown, and Mr. Carter of Newfoundland told of the favourable experience of his Province with one Chamber. The motion, however, was for a time withdrawn. When it was brought up again, Mr. McCully of Nova Scotia made the sensible suggestion to "let Upper Canada try a single Chamber and if it succeeds the other Provinces can afterwards adopt it": and this was carried. It was not until the third draft that the express provisions for the number of Chambers were formulated.¹

The minute division of legislative authority between Dominion and Provinces formed in Sections 91 and 92 was the subject of a considerable amount of discussion—only two matters seem to call for special comment.

By Section 91 (27) the Dominion is given legislative power in Criminal Law: by Section 92 (13) the Provinces, in Property and Civil Rights in the Province—these two provisions indicate the fundamental causes of the Federal system being adopted in the Constitution of the Dominion instead of a Legislative Union.

When civil government was provided for Canada instead of military rule by the Royal Proclamation of 1763, it was ordered that "public Justice within Our said" Colony in "all Causes as well Criminal as Civil" should be administered "as near as may be agreeable to the Laws of England." With the English Criminal Law there never was any complaint in French Canada; but there was much feeling against the English Civil Law: and this had no little to do with the passing of the Quebec Act of 1774. Carleton advised "as the only way of doing

British Columbia had one House called the Legislative Council: in anticipation of coming into Confederation, she changed the name to the Legislative Assembly in 1871 by the Act 1871, 34 Vict., No. 147 (B.C.).

When the Provinces of Alberta and Saskatchewan were created by the Dominion Acts of 1905, 4 and 5 Edward VII, CC. 3 and 42, it was provided that their Legislature should have only one Chamber called the Legislative Assembly. New Brunswick got rid of her Legislative Council by the Act of 1891, 54 Vict., C. 9 (N.B.) becoming effective in 1892.

Prince Edward Island had two Houses until the Act of (1893), 56 Vict., C. 1 (P. E. I.) became effective the following year—thereafter one Councillor and one Assembly man were to be elected for each electoral district, but all to sit and vote in one House, the Legislative Assembly (reminding the student of constitutional history of the ancient Scottish Parliament).

¹ Pope, *Confederation*, pp. 21, 75, 175.

justice and giving satisfaction to the Canadians, which is to continue the laws of England with respect to criminal matters, but to revive the whole body of the French laws which were in use there before the Conquest with respect to civil matters."¹

This suggestion was adopted by the Government of the day: and the Bill contained provisions to that effect. In the House of Commons, there was much opposition to the reintroduction of the French civil law. Townshend said it deprived "many British-born subjects . . . of the dearest birth-rights of Britons." Dunning asked "Where is the Englishman who would not fall into an agony if he understood that he was to be deprived of" the English law? Mr. Mackworth moved that a clause should be introduced "that in all trials relating to property and civil rights where the value shall exceed a certain sum either of the parties may demand a trial by jury constituted according to the laws of England."

In the result, however, the Government carried their Bill in which as Lord North said "there were the fewest inconveniences, the civil law of France being left to the Canadians", but the criminal law remaining unchanged.²

The Act as passed provided "that in all matters of controversy relative to Property and Civil Rights, resort shall be had to the Laws of Canada as the Rule for the Decision of the same." But considering "the certainty and lenity of the Criminal Law of England and the benefits and advantages resulting from the use of it," it was continued in full force.³

The agitation against the Quebec Act continued as fierce for long after as before its enactment; but the immigration of the United Empire Loyalists induced the Mother Country to form two Provinces instead of one, and this in turn abolished the French Canadian law in a large part of Canada. These immigrants had been accustomed to English law: and it was thought well to divide the Colony and to give each section the right to determine for itself the system of law under which it would live. The Constitutional Act effected this: and by the first Act of its first Parliament, Upper Canada enacted that "in all matters of controversy relative to property and civil rights resort shall be had to the laws of England as the rule for the decision of the same"; the second Act provided for trial by jury.⁴

¹ Shortt & Doughty, pp. 121, 128, 150, 252, 258.

² 17 Hansard pp. 1358, 1359, 1360, 1361, 1394.

³ Shortt & Doughty, p. 404.

⁴ (1792) 32, George III, C. 1, S. 3 (U.C.): (1792) 32 George III, C. 2, S. 1 (U.C.).

Thereafter even after the Legislative Union in 1841, the two Provinces remained different in their laws in respect of "property and civil rights", Upper Canada being a Common Law. Lower Canada, a Civil Law country.

But the Province of Lower Canada did not abolish the English Criminal law: accordingly the two Provinces had (substantially) the same criminal law.

Therefore when a division came to be made between Dominion and Provinces in respect of Legislative Power, it naturally followed that the Dominion would take the subject of Criminal Law and the Province that of Property and Civil Rights.

Section 133. "Either the English or the French language may be used by any person in the debates of the House of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person or in any pleading or process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

"The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those languages." In the articles of Capitulation of Montreal there was nothing said as to the French language and the demand that the Canadians should continue to be governed according to *La Coutume de Paris* was refused. But of course the French language continued to be used except amongst the English newcomers. Proclamations, ordinances etc., were printed in both English and French. Neither the Proclamation of 1763 nor the Acts of 1774 and 1791 made any provision for language or made any change in the practice.¹

In Upper Canada, all proceedings of every kind were after the organization of the Province, in English, but provision was early made for the French language being used in writs as against "a Canadian subject by treaty or the son or daughter of such Canadian subject."²

When Lord Durham made his investigations resulting in the Union, he reported "I entertain no doubt as to the national character which must be given to Lower Canada; it must be that of the British Empire; that of the majority of the population of British America: that of the great race which must in the lapse of no long period of time be predominant over the whole North American continent. Without effecting the change so rapidly or so roughly as to shock the feelings

¹ Shortt & Doughty, pp. 8, 18, 27, Art. XLII, 401, sqq, 694 sqq.

² (1794) 34 George III, C. 2, S. 9 (U.C.).

and trample on the welfare of the existing generation, it must henceforth be the first and steady purpose of the British Government to establish an English population with English laws and language in this Province and to trust its government to none but a decidedly English Legislature."¹

In the Union Act there was inserted a provision that "all Writs, Proclamation, Instruments for summoning and calling together the Legislative Council and Legislative Assembly of the Province of Canada, and for proroguing and dissolving the same and all Writs of Summons and Election and all Writs and public Instruments whatsoever relating to the said Legislative Council and Legislative Assembly or either of them and all Returns to such Writs and Instruments, and all Journals, Entries and written or printed Proceedings of what nature soever of the said Legislative Council and Legislative Assembly and of each of them respectively and all written or private Proceedings and Reports of Committees of the said Legislative Council and Legislative Assembly respectively shall be in the English language only: Provided always that this Enactment shall not be construed to prevent translated copies of any such Document being made but no such copy shall be kept among the Records of the Legislative Council or Legislative Assembly or be deemed in any case to have the force of an original Document."²

Vigorously opposed as was the Act in both Houses of Parliament, no exception seems to have been taken to this clause.

But the French Canadian people never submitted to this proscription of their language; their leaders on both sides agitated against it both in the Canadian Parliament and out of it. At length, in 1848, the Imperial Parliament repealed the obnoxious section.³ Thereafter the French language received due consideration in the Canadian Parliament.

No discrimination against its use in the new Dominion was ever contemplated. At the Quebec Conference, it was moved by Mr. (afterwards Sir) A. T. Galt and unanimously agreed to "that in the General Legislature and in its proceedings, the English and French languages may be both especially employed. And also in the Local Legislature of Lower Canada and in the Federal and Local Courts of Lower Canada." This with a change making it read "Federal Courts and in the Local Courts" appeared in the Report of the Delegates, and the Resolution of Westminster, with an immaterial

¹ "Report etc.," p. 212: this has already been quoted in another connection.

² (1840) 3 and 4 Vict., C. 35, S. 41 (Imp.)

³ (1848) 11 and 12 Vict., C. 56, S. 1 (Imp.). The *Canada Gazette* appeared in both languages as early as 1844.

change in terminology in the Rough Draft; in the first Draft it is enlarged so as to authorize the use of either language in the Debates of the House of Parliament and the Local Legislature of Lower Canada, the Records and Journals of these Houses and "by any person or in any Pleading or Process or in issuing from any Court of the United Colony or in or from all or any of the Provincial Courts of Lower Canada." (Sir) John A. Macdonald queried this provision "Qu? whether as to Courts of the United Colony this should not be confined to such of those Courts as sit in Lower Canada."

The third Draft makes it obligatory to use both languages in the Records and Journals of the Parliament of Canada and of Lower Canada; the fourth Draft provides that the Statutes of Canada and of Quebec shall be printed in both languages in separate volumes; the final Draft follows the third and the Act as passed is the same in substance.¹

MEMORANDUM.

In considering the Conferences, leading upon to Confederation and the forms assumed by the proposed legislation, it should be borne in mind:—

There was in 1864, a Conference at Charlottetown of Delegates from Nova Scotia, New Brunswick and Prince Edward Island at which Delegates from Canada made their appearance, but nothing was there decided except to hold another Conference at Quebec.

The Quebec Conference was held October 1864, attended by Delegates from Canada, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland, resulting in a Report of the Delegates. The proceedings at this Conference so far as available will be found in the volume mentioned in Note 4 p. 79 *supra*, at pp. 1-88; the Report of Delegates pp. 38-52.

Prince Edward Island and Newfoundland standing aloof, Delegates from Canada, Nova Scotia and New Brunswick in 1866, met at the Westminster Palace Hotel, London, and had a Conference, the Proceedings of which are given in outline pp. 94-97, pp. 111-122, and their Resolutions pp. 98-110.

A Rough Draft of the proposed Bill was then drawn up, pp. 123-140; the first Draft then followed, Jan. 23rd, 1867, pp. 141-157; a second Jan. 30th; a third February 2nd, pp. 158-176; a fourth pp. 177-211; a final Draft Feb. 9th pp. 212-247; the Act as passed pp. 248-293.

¹ Pope, "Confederation," pp. 33, 48, 107, 135, 156, 175, 243, 279.

**Pre-Assembly Legislatures
in British Canada**

by

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CHAPTER I.

BEFORE THE FIRST COUNCIL OF 1764.

(Read May Meeting, 1918)

At the time of the Conquest of Canada in 1759-60, Britain had had much experience with Colonies on this side of the Atlantic and had a settled policy in their government. In Canada she derived little if any assistance from the methods of France, and the period of French rule may be neglected in the consideration of the history of Canadian Parliaments (1). In the Articles of Capitulation at Montreal between Amherst and Vaudreuil, Sept. 8, 1760, the free exercise of their religion was assured to the Canadians (Art. XXVII) but the request that they might not be called upon to bear arms against their former Sovereign met the curt reply "They become Subjects of the King;" and the request that they should continue to be governed according to the custom of Paris and the laws and usages established for Canada met the same fate. (Art. XLI, LXII) (2).

Not being embarrassed by stipulations entered into with the conquered people, the British Generals during the period of military rule (which lasted till after the Definitive Treaty of Paris, February 10, 1763) governed Canada on the ordinary principles of military rule (3). Nor did the Treaty of Paris change the situation: His Most Christian Majesty King Louis XV ceded to King George III, Canada with all its dependencies, in the most ample manner and form without restriction; while King George agreed to grant the liberty of the Catholic religion to the inhabitants of Canada (Art. VI); but there was no provision as to law, government or language (4).

The time had now come for civil government; Canada was not only *de facto* but also *de jure* part of the British dominions.

Before 1696, supervision over His Majesty's possessions beyond the Seas had been exercised by the Privy Council or for a short time during the reign of Charles I by a Commission: in 1675 a Committee of the Privy Council had been entrusted with the control of trade and foreign plantations—"the Lords of Trade." In 1696, however, a new body was formed—the "Board of Trade"—by commission under the Privy Seal: some but not all of the members of the Board of

Trade—who now received the title “Lords of Trade”—were members of the Privy Council.

The powers of the Board were very extensive but not in all matters and at all times perfectly definite (5): at the time of the Conquest of Canada it was largely an administrative body, one of the most important of whose functions was the furnishing of information and advice to Parliament and the Great Officers of the Crown on colonial matters.

The Treaty of Paris having been concluded, Lord Egremont, Secretary of State, requested the Board of Trade to take under consideration and advise as to what new Governments should be formed in North America and what form should be adopted for such new Governments, suggesting that it might be a proper object of consideration how far it was expedient to retain or depart from the forms established by France in these Colonies. (6).

In an admirable report, the Board, June 8, 1763, recommended (*inter alia*) that a “Government” should be formed for Canada, with a Governor and Council under His Majesty’s Commission with instructions adapted to the needs of the Country (7). The Board of Trade urged the settlement of Canada by encouraging those in the old North American Colonies to form new settlements and by giving land to Officers and Soldiers who had distinguished themselves during the war (7). This suggestion was also approved (8).

The Board by Message of July 14, 1763, were informed that James Murray had been selected as Governor of Canada and they were directed to draft a Commission and Instructions for him (9). Apparently it was when considering the Commission and Instructions, that the Board changed their views as to the proper form of Government for Canada: we find that in a Report, October 4, 1763, made to Halifax they say “It appears to us upon a Revision of the Report * * of the 8th of June last, that it will be expedient for His Majesty’s Service and give Confidence and Encouragement to such persons as are inclined to become Settlers in the new Colonies that an immediate and public Declaration should be made of the intended permanent constitution and that the power of calling Assemblies should be inserted in the first Commissions” (10).

Having prepared the draft Commission and Instructions, they transmitted the documents with a Report in which they say that “they conceived it to be Your Majesty’s Royal Intention that the Form and Constitution of Government in these new Colonies” (including Canada) “should be as near as may be similar to what has been established in those Colonies which are under Your Majesty’s immediate Government:” and they accordingly prepared Commissions

"by which the Governors were empower'd and directed so soon as the circumstances of the Colonies will admit thereof, to summon and call General Assemblys of the Freeholders * * * in such manner as is practised in Your Majesty's other Colonies" (11).

In the North American Colonies the government as prescribed by Commission and Instructions to the Governor consisted of a Governor, a Council selected by the Crown and an Assembly elected by the people. Both Assembly and Council took part in legislation and the Council also formed an Executive: the Governor gave or withheld the Royal consent in all legislation.

It did not seem advisable to call a House of Assembly immediately in Canada because it contained "within it a very great number of French Inhabitants and settlements and * * the Number of such Inhabitants must greatly exceed for a very long period of time that of Your Majesty's British and other Subjects even supposing the utmost efforts of Industry on their part either in making such new Settlements, by clearing of Lands or purchasing old ones from the ancient Inhabitants"—as the Board of Trade express it in their Report (10).

The object of promising an Assembly was plainly to induce settlement from the Old Land and the American Colonies, countries which enjoyed the advantage of a House elected by the people, not nominated by the Crown.

The Royal Proclamation of October 7, 1763, which divided the newly acquired territory, formed the "Government of Quebec" from old Canada (12) and stated that express power had been given to the Governors of the new Governments (including Quebec) "that so soon as the state and circumstances of the said Colonies will admit thereof, they shall with the Advice and Consent of our Council summon and call General Assemblies * * in such manner and form as is used and directed in those Colonies and Provinces in America which are under our immediate Government" (13).

In the Commission issued to General James Murray as Governor in Chief of the Province of Quebec, November 21, 1763, a Council was provided for, to be appointed by the Crown; and he was empowered "so soon as the situation and circumstances of our said Province under your Government will admit thereof and when and as often as need shall require to summon and call General Assemblies of the Freeholders and Planters within your Government"—and he was commanded to govern according to his Instructions or "according to such reasonable laws and statutes as shall hereafter be made and agreed upon by you with the advice and consent of the Council and Assembly of Our said Province." With the Council and Assembly or the major part of them, he was to "make, constitute and ordain, Laws, Statutes

and ordinances for the public peace, welfare and good Government of our said Province and of the people and inhabitants thereof and such others as shall resort thereunto" (14).

The Royal Instructions, December 7, 1763, directed Murray to "nominate and establish a Council" for the Province to assist him in the administration of Government, i.e., an Executive Council: until the establishment of an Assembly he was "to make such Rules and Regulations by the Advice of Our said Council as shall appear to be necessary for the Peace, Order and good Government of Our said Province:" but he was "with the Advice of Our Council" to "summon and call a General Assembly of the Freeholders in Our said Province . . . as soon as the more pressing affairs of Government will allow—to give all possible attention to carrying this important object into Execution." After the establishment of an Assembly he was to legislate "with the Advice and Consent of Our said Council and Assembly" (15).

It is thus clear that it was intended that ultimately Quebec should be governed as the Royal Colonies to the south; but that for the time being there should be but one legislating house whose members were to be also Executive Councillors.

There is one provision in the Instructions worthy of note in this connection—after reciting that Members of several Assemblies in the Plantations had frequently assumed to themselves Privileges no ways belonging to them, amongst others that they had "taken upon them the sole framing of Money Bills refusing to let the Council alter or amend the same," the Instructions proceed "It is also Our further Pleasure that the Council have the like Power of framing Money Bills as the Assembly" (16). The difficulty experienced by many Colonial Governors in the American Colonies with Assemblies claiming the exclusive right to deal with money bills is well known—the story is a most interesting chapter in Constitutional History. Most of the Colonies in defiance of the Home Authorities, the Board of Trade and the Privy Council asserted and successfully asserted this right—perhaps the case of New York is the best known instance of Colonial self-assertion, but Massachusetts, New Jersey, North Carolina and other Colonies were equally firm and equally successful (17).

This provision was intended to prevent such an assertion by "the Commons" of Canada.

NOTES TO CHAPTER I.

(1) Those interested in the constitution of Canada under French rule may consult General Murray's Report on the State of the Government of Quebec, June 5, 1762; this is printed in convenient form in Shortt and Doughty's Documents

relating to the Constitutional History of Canada, 1759-1791, Canadian Archives 1907, Vol. III (Sessional Paper, No. 18), pp. 37 sqq.

Some account will also be found in my "Constitution of Canada," Yale University Press (the Dodge Lectures, Yale Univ. 1917) Lecture I.

(2) Shortt and Doughty *ut supra*, pp. 14, 17, 18, 25, 27.

(3) There has been much written of complaint against the military rule during the years from 1759 to 1763; and no doubt there were some incidents of a more or less harsh and arbitrary character: but taken as a whole, the administration was as considerate and as successful as could be expected under the circumstances. There was no act of apparent injustice or cruelty which could not be paralleled by a similar act about the same time in the British Isles, not to speak of France.

(4) Shortt and Doughty *ut supra* pp. 75, 85, 86.

(5) I have written a somewhat exhaustive note on the powers and functions of the Board of Trade (which may some day see the light); but since writing it, I have seen a sufficiently extensive, a very well-written and accurate account in Dr. Dickerson's *American Colonial Government*, Cleveland, The Arthur H. Clark Company 1912, which may be consulted with confidence by those interested.

(6) Shortt and Doughty *ut supra* p. 94.

(7) Shortt and Doughty, p. 111, Report of Aug. 5, 1763.

(8) Shortt and Doughty, p. 113, Halifax to Board of Trade, Sept. 19, 1763.

(9) Shortt and Doughty, p. 108.

(10) Shortt and Doughty, p. 114, Sir Charles Wyndham, Second Earl of Egremont, had died suddenly, Aug. 21, 1763, and had been temporarily succeeded by the Earl of Halifax as Secretary of State.

(11) Shortt and Doughty *ut supra* p. 116.

(12) This may not be literally accurate but it is substantially correct and is at all events near enough for our present purpose. The boundaries of the Government of Quebec are given in Shortt and Doughty *ut supra* p. 120.

(13) Shortt and Doughty *ut supra* p. 120.

(14) Shorty and Doughty *ut supra* pp. 127, 128.

(15) Shortt and Doughty *ut supra* pp. 133, 135.

(16) Shortt and Doughty *ut supra*, pp. 136, 137.

(17) I have written a note of some length on this subject; but sufficient will be found in Dr. Dickerson's Work mentioned in note (5). I give but one instance—in 1735 a serious clash occurred between the Council and the Assembly of South Carolina over the right of the Assembly to control money bills. The Council amended a money bill by adding an item and insisted that they would not pass the bill without this item.

The Assembly passed the following Resolution, February 8, 1735:

"Resolved, That His Majesty's Subjects in this Province are entitled to all the Libertys and Privileges of Englishmen,

"Resolved, That the Commons House of Assembly in this Province, by the Laws and Statutes of Great Britain made of force in this Province, and by the Acts of Assembly in this Province, and by Ancient Custom and Usage have the same Rights, Powers and Privileges in regard to introducing and passing Laws for the imposing of Taxes on the People of this Province as the House of Commons of Great Britain have in introducing and passing Laws on the People of England.

"Resolved, That after the Estimate is closed and added to any Tax Bill, that no additions can or ought to be made thereto, by any other Estate or Power whatsoever, but by and in the Commons House of Assembly."

The Council insisted (the salary of Chief Justice Wright, one of its members was in question); but there was the usual outcome—the Council was forced to give way.

An account of this dispute is given in "The Life of Henry Laurens," by Dr. Wallace, G. P. Putnam's Sons, New York and London, 1915, at pp. 37 sqq.—the learned author speaks of the House of Assembly's "arrogant and tyrannical exercise of power."

CHAPTER II.

1763-1774. THE FIRST LEGISLATURE.

It is now fitting that the composition of this Legislative Council should be considered.

In addition to the two persons selected by the Home Government as Lieutenant-Governors of the Districts of Montreal and Trois Rivières respectively, the Chief Justice of Quebec and the Surveyor General of Customs for the Northern District of North America (both also selected by the Home Administration) the Governor was to choose eight other persons "from amongst the most considerable of the Inhabitants of or Persons of Property in" the Province: those chosen were to take the oath of Supremacy and to sign the Declaration against Transubstantiation, etc., (1) as well as to take the oath of office; their names and characters were to be sent to the Board of Trade so that if any should not be approved by the Board, their place could be filled with others. The Governor might remove or suspend any Councillor for just cause and appoint others, until the will of the Crown should be known—but he was not to remove or suspend any Councillor who had been confirmed by the Crown, without good and sufficient cause and the consent of the majority of the Council after due examination of the charge against him and his answer. No member was to be absent from the Province more than six months without leave of the Governor or Commander in Chief; and not for a year without leave given under the Sign Manual of the King; if anyone wilfully absented himself, residing in the Province, he was to be admonished and if he persisted in his default after admonition he was to be suspended till the Royal pleasure should be known. In all cases of suspension for any cause, a full account of the proceedings and of the reasons for suspension was to be transmitted at once to the Board of Trade.

The Members of the Council were "to have and enjoy Freedom of Debate and Vote in all Affairs of Public Concern that may be debated in Council," and all Laws, Statutes and Ordinances passed were to be transmitted within three months of their passing to the Board of Trade (2).

The Province being under the immediate government of the King, and not that of the Parliament of the United Kingdom, of course it was for the King to give directions as to the legislative body in the colony. While by his Instructions, he directed the Governor to nominate and appoint Members of the Council he was not thereby deprived of the common-law power of himself appointing others to any desired number—those were appointed by a Mandamus issued to the Governor. There were then to be the two methods of appointment to the Council (1) by Summons from the Governor and (2) by Royal Mandamus—some of the Consequences of this dual system will be mentioned in the Memorandum added to this Chapter.

Governor Murray proceeded in June and July, 1764, to appoint Councillors; and at the first Council held Monday, August 13, 1764, there were present in addition to himself and Chief Justice William Gregory, seven persons "nominated Members of His Majesty's Honourable Council by His Said Excellency"—a mandamus had issued in July for another but he was not yet sworn in and is, of course, not noted as being present. Chief Justice Gregory was appointed President of the Council (3).

The Council with the successive Governors passed much useful legislation—of a purely local character of course; and seem to have been fairly efficient as legislators. But there was dissatisfaction in some quarters. It was not long before the English traders in Quebec began to press for an Assembly; and their request was backed up by a number of London merchants trading with Quebec—it was of course intended that the Members of the Assembly should be Protestants, as no others were considered qualified. There was no objection to Roman Catholics voting; and it was urged that there was a number more than sufficient of loyal and well-affected Protestants to form a competent and respectable House of Assembly. As early as September, 1765, the Board of Trade recommended the summoning of an Assembly, the Members to be Protestants, the voters of either religion. Opinions as to the expediency of an Assembly differed; e.g. Francis (afterwards *Cursitor Baron*) Masères (4) who became Attorney-General of Quebec in 1766 thought that such an Assembly would in truth be representative of only the 600 (5) new English Settlers and an instrument in their hands of domineering over 90,000 French—moreover he thought that the Canadian bigotted to the Popish religion should not be trusted with any power.

Masères afterwards in 1769, as Attorney General for the Province and on the order of Carleton the Governor, drew up a Report concerning the state of the Laws and the Administration of Justice in the Province in which he said that Murray's Commission did not justify

legislation without an Assembly and that all the Ordinances theretofore made had been made without warrant or authority from the Commission and therefore might perhaps be justly contended to be null and void (6). This Report did not meet the approval of Carleton; and there does not seem to be any solid ground for Masères' doubts.

The London Merchants pressed a claim for a full Legislature, i.e., an Assembly and a Council; and in 1769 the Board of Trade took the matter into consideration. They suggested as an experiment and not as a fixed and permanent system, an Assembly of twenty-seven Members who should not be required to subscribe the declaration against Transubstantiation (except those elected for the two Cities of Quebec and Montreal and the Town of Trois Rivières) but only to take the oaths of Allegiance, Supremacy and Abjuration, thereby allowing Roman Catholics to be elected for the rural constituencies. It was expected by this means to assure nearly an equal number of Protestant and Catholic Members in the popular house (7). Nothing came of this scheme.

From time to time petitions were sent to the Home Governments by "Old Subjects" (i.e. those who did not become Subjects by the Conquest and Treaty of 1763, these being the "New Subjects") asking for an Assembly, claiming that there was a sufficient number of Protestant Subjects in the Province qualified to be Members. Occasionally but very rarely it was suggested that Roman Catholics and French Canadians might be admitted to Parliament; generally the monopoly of seats in Parliament was considered the right of Protestants. Solicitor General Wedderburn, indeed, thought it would be a dangerous experiment to admit a Canadian to a place in the Assembly but thought also that it would be impossible to exclude Canadians from voting—he was wholly opposed to an Assembly and thought that the power to make Laws must be vested in a Governor and a Council consisting of a certain number of persons not wholly dependent on the Governor (8).

The French Canadians did not much trouble themselves about an Assembly; what they were desirous of, was to recover their old laws of which they had been deprived by the Royal Proclamation of October, 1763.

But the incessant cry on the part of the "Old Subjects" (9) caused the question of the form of Parliament to be taken up by the Home Administration. "The Quebec Act" of 1774 was the result. The Royal Instructions to the Governor who followed Murray contained the same provisions as to calling a General Assembly as did the

Instructions to Murray (10) but the Quebec Act put an end to such a measure for nearly a score of years.

Before this period is left, mention should be made of the judicial powers of the Council.

The Royal Commission to Murray Nov. 21, 1763, gave him power with the advice and consent of the Council to "Erect, Constitute and Establish such and so many Courts of Judicature and Publick Justice . . . as you and they shall think fit and necessary . . .": and he was given power "to constitute and approve Judges &c". In pursuance of this power, an Ordinance was passed September 17, 1764, "by and with the Advice, Consent and Assistance of His Majesty's Council" establishing a Court of King's Bench to sit at Quebec twice a year with an Appeal to the Governor and Council where the matter in contest was above the value of £300 Sterling, and a further Appeal to the King in Council where the matter in contest was of the value of £500 Sterling or upward.

A Court of Common Pleas, an inferior Court, was also established to try cases above the value of £10 with an Appeal to the Court of King's Bench where the matter in contest was of the value of £20; where it was above the value of £300 Sterling the appeal might be taken immediately to the Governor and Council with a further Appeal to the King in Council if it was of the value of £500 Sterling or upward.

The Ordinance of February 1, 1770, establishing a separate Court of Common Pleas at Montreal did not modify this appellate jurisdiction which continued in effect during the remainder of this period.

There was a temporary ordinance, November 12, 1764, allowing an Appeal to the Governor and Council from "any Order, Judgment or Decree of the Military Council of Quebec or of any other Courts of Justice in the Said Government or of those of Montreal or Trois Rivières prior to the Establishment of Civil Government throughout this Province in August last, where the Value in Dispute exceeded the Sum of Three Hundred Pounds Sterling" with a further Appeal to the King in Council where the value was £500 or more.

Another temporary ordinance, September 1, 1773, was passed by reason of the absence of the Chief Justice (William Hey) from the Province: it constituted (during this absence) the Governor and Lieutenant Governor or in their absence the Eldest Member or President of the Council (not being a Judge of the Court of Common Pleas) together with every other Member of the Council, the Court of Appeal from the Courts of Common Pleas—no Judge of a Court of Common Pleas to sit in this Court. The Governor or Lieutenant-Governor or in their absence the Eldest Member or President with five other

Members were to be a quorum. In cases over £500 Sterling there was the further Appeal to the King in Council.

NOTES TO CHAPTER II.

(1) The Oath of Supremacy is prescribed by 1 Geo. I, St. 2, C. 13; the Declaration against Transubstantiation, &c., by 25 Car 11, C. 2. cf. Blackstone's Commentaries, vol. 4, Chap. 4.

(2) The Royal Instructions to General Murray, December 7, 1763, are printed in Shortt and Doughty, *ut supra*, pp. 132 sqq.

(3) The first Legislative Council of the Province of Quebec met "At the Council Chamber in the Castle of St. Louis in the City of Quebec on Monday, the thirteenth day of August, 1764."

Those present were:—

"His Excellency the Honorable James Murry, Esq.
and

William Gregory
Paulus Emilius Irving
Hector Theophilus Cramahé
Samuel Holland
Walter Murray
Adam Mabane
Thomas Dunn
Francis Mounier.

Nominated members of His Majesty's Honorable Council by His said Excellency."

(Extract from the State Book "A," containing the Minutes of said Council from the 13th August, 1764, to 22nd May, 1765).

But it appears that there was a Royal Mandamus, July 20, 1764, appointing James Goldfrap (the Governor's Secretary) to the Council, and he received a Summons the same day (Index to State Book "A" pp. 72, 669): he was not sworn in, however, till Oct. 10, 1764, and therefore did not take part in the first meeting.

Benjamin Price took the oath on his appointment to the Council and took his seat October 31, 1764, thereby completing the number the Governor could appoint.

William Gregory was a English barrister who was in 1764 sent out by the Home Government to Quebec as Chief Justice of the Province. He was superseded, February, 1766, never having been of the slightest service to the country and leaving no mark on its jurisprudence. He was succeeded both as Chief Justice and as President of the Council, September, 1766, by William Hey, a much abler man.

Gregory is said to have "been let out of prison to preside on the bench, was ignorant alike of civil law and the language of the country," Garneau's History of Canada (translated by Bell), Montreal, John Lovell, 1862, Vol. 1, p. 91.

Lt.-Col. Paulus Aemilius Irving, an officer in the British Army, who for a few months in 1766 acted as Governor on Murray's recall by Conway; he was of the family of Irving of Bonshaw, Dumfriesshire, Scotland, had taken part in the Siege of Quebec under Wolfe and been wounded on the Plains of Abraham.

Hector Theophile Cramahé, a Protestant Swiss, who had been Civil Secretary for the District of Quebec during the military occupation from the time of Murray's appointment as Lieutenant-Governor of that District.

Murray had great confidence in him and in October, 1764, sent him to London to explain certain difficulties which had arisen. When in 1769 Sir Guy Carleton obtained leave of absence from his post as Governor in chief, Cramahé was appointed

Lieutenant-Governor and acted as such till Carleton's return in 1774. Being in command at Quebec on the approach of Arnold's expedition in 1775, he acted with promptness and prudence—removing all the sailing craft from the south side of the river, he delayed the invaders and probably saved Quebec. He continued to take a very prominent part in the affairs of the Province for many years and seems to have been a capable reliable and conscientious public servant. His Summons seems to be dated June 21, 1764.

Adam Mabane, a Scotsman, educated at Edinburgh for the medical profession who came to Quebec as a Surgeon (or Surgeon's mate) in the British Army. He was pushing and untiring in his efforts to advance himself, and obtained the confidence of successive Governors, especially Haldimand whom he almost entirely dominated. He was removed from the Council, 1766, by Carleton, appointed a Judge of the Court of Common Pleas under the Quebec Act of 1774, a member of the Legislative Council, and lastly a Judge of the Court of King's Bench. He acquired considerable property and played a great part in the history of Quebec during the early years of British rule.

Walter Murray, of whom Carleton says in a letter to Lord Shelburne October 26, 1766 (S. & D., pp. 192, 193), "Mr. Walter Murray who has acted as a strolling player in other Colonies, here as a Councillor"—otherwise unknown to fame.

Samuel Holland, Surveyor General. Dr. Scadding in his "Surveyor General Holland," Toronto, 1896, has an account of Holland; the following will be sufficient here. Holland seems to have been a native of Canada, a personal friend of General Wolfe who made him a present of a brace of fine pistols. He was engaged in making surveys at Louisbourg after its surrender in 1744 where he made the acquaintance of Capt. Simcoe father of John Graves Simcoe, afterwards Lieutenant-Governor of Upper Canada. He became the first Surveyor General of British North America, a position he filled for nearly fifty years. His residence at Quebec was near Spencer Wood and was known as Holland House. He died at Quebec in 1801, a member of the Executive and Legislative Councils. Holland River and Holland Landing are called after him.

Thomas Dunn, born in 1731 in Durham, England, Engaging in commercial life, he came to Canada very shortly after the Conquest in 1759-60 and carried on business as a merchant. So far as appears, he had no legal education but he was a man of great executive ability, and was "most enlightened, able minded and impartial." A member of the first Executive Council he became a member of the first Legislative Council in 1775, and the same year Judge of the Court of King's Bench, Quebec. He became Administrator of the Government in 1805 and again in 1811 and acted with promptness and energy. A Seigneur, he was very popular with the French-Canadian people and with no small number of the English population, but in those days it was impossible to please both factions.

Francois Mounier, a French-Canadian merchant, described by Carleton in his letter above mentioned as "an honest quiet trader who knows very little of our Language or Manners like most Canadians will sign without Examination whatever their Acquaintance urges them to." Gagnier says Vol. I, pp. 87, 88, "Only one native was admitted; the exceptional man being a person of no mark and his name added merely to complete the requisite number."

(4) Dr. Kingsford in his History of Canada, Vol. V, p. 165 n, gives a fairly full and accurate account of Masères; Masères' paper will be found in Shortt and Doughty, Const. Docs., pp. 179 sqq.

(5) Shortt and Doughty, p. 185.

(6) Shortt and Doughty, pp. 243 sqq.

(7) Shortt and Doughty, p. 267.

(8) Shortt and Doughty, pp. 297 sqq.

(9) Shortt and Doughty, pp. 263-352.

(10) Shortt and Doughty, pp. 210 sqq., Instructions to Sir Guy Carleton, 1768, as Governor in Chief: Paulus Aemilius Irving, Hector Theophile Cramahé and Sir Guy Carleton had acted as Lieutenant-Governor in the absence from the Province of the Governor-in-Chief; but the Royal Instructions issued only to the Governor-in-Chief. The only two Governors-in-Chief from the Royal Proclamation of 1763 to the Quebec Act were General James Murray and Sir Guy Carleton.

Memo.—I add here the references to Councillors extant in the Archives at Ottawa.

- 1764 July 20—James Goldfrap summoned to Council.
 " " —Royal Mandamus appointing James Goldfrap to Council.
 " Aug. 13—Meeting of Council, see *Note 3 supra*.
 " Oct. 31—Benjamin Price sworn in and took his seat.
 1765 June 27—Charles Stewart, Surveyor General, sat as a member of the Council at a meeting at the Castle of St. Louis.
 " Sept. 25—Hugh Finlay received a Summons to Council.
 1766 May 22—Thomas Dunn received a Summons.
 " June 14—Charles Stewart, Surveyor-General, sat with Council (cf June 27, 1765).
 " June 14—James Cuthbert Esq., sworn in and took his seat as Councillor.
 " " 21—Hector Theophilus Cramahé received a Summons.
 " " 30—Thomas Mills Esq., sworn in and took his seat as Councillor.
 " Sept. 5—Chief Justice William Hey sworn in and took his seat as Councillor.
 1767 Jan. 2—Benjamin Price sat as Councillor.
 1768 April 11—Mr. Colin Drummond sworn in and took his seat as Councillor.
 1769 Jan. 1—Hugh Finlay appointed Councillor.
 1772 April 4—Francis Levesque appointed Councillor in lieu of Hugh Finlay to embark for London.
 1773 Jan. 9—John Collins and Edward Harrison appointed Councillors.
 " Oct. 8—John Carden Esq., appointed Councillor.

A report made in 1766 shows the following as Members of the Council with the date of their admission:—

- 1764 Aug. 13—Paul Æmis Irving. Again swore in 24th Sept., 1766 by Mandamus.
 Hector Theophilus Cramahé dated 21st June, 1766 (4?) swore in again 24th September, 1766, by Mandamus.
 Samuel Holland.
 Walter Murray again swore in 24th Sept., 1766.
 Adam Mabane " "
 Thomas Dunn " "
 Francis Mounier.
 1764 Oct. 10—James Goldfrap by Mandamus dated 20th July, 1764, again swore in 24th September, 1766.
 " " 31—Benjamin Price.
 1765 June 20—Charles Stewart S.G. by Mandamus.
 1766 June 14—James Cuthbert.
 " " 30—Thomas Mills R.C. by Mandamus.
 " Sept. 25—William Hey C.J. by Mandamus.
 (in the room of William Gregory Esq., late Chief Justice and struck out of the Council.)

Goldfrap being appointed by Mandamus from the King, the Council was complete when Benjamin Price became the eighth member appointed by the Governor. Charles Stewart was appointed by Mandamus.

How Hugh Finlay was appointed does not specifically appear but it must have been by Mandamus.

James Cuthbert was appointed by the Governor. I presume Col. Irving taking over the Governorship on Murray's leaving for England made a vacancy, "forced," Cuthbert told Carleton, "into the Council by Governor Murray on his departure much against his will." Shortt & Doughty, p. 193.

Thomas Mills was appointed by Mandamus.

Some of the members (who had been appointed by Murray) wrote about this time (October, 1766), to the new Governor, Sir Guy Carleton, of the practice of appointing by Mandamus. Carleton had assumed the reins of government September 24, 1766; they contended that while His Majesty might have an undoubted right to grant Mandamus where he pleased, that could not deprive the appointed members of their "Right to Procedure or to a Seat in Council." Carleton had called only certain members to Council Meetings and those left out supposed they were being excluded from the Board—they claimed that if the number of Members was limited by the Constitution or Custom, a Mandamus should be effective only if there was a vacancy.

Carleton's reply was not conciliatory—however, he informed them that the Council was composed of twelve members, "those named and appointed immediately by the King have the Preference next follow those appointed by Governor Murray till the Seats are all full." Shortt and Doughty, pp. 193-195.

He took occasion in his letter to make clear to the recalcitrants that he would "on all matters which do not require the Consent of Council call together such Councillors as I shall think best qualified to give me Information and further that I will ask the Advice and Opinion of such Persons tho' not of the Council as I shall find Men of Good Sense, Truth, Candor and Impartial Justice, persons who prefer their Duty to the King and the Tranquility of his Subjects to unjustifiable Attachment, Party Zeal and to all selfish mercenary views. After I have obtained such Advice I will still direct as to me shall seem best for His Majesty's Service, and the Good of the Province Committed to my Care."

In other words while recognizing that the "Advice and Consent" of the Council was necessary in legislation he declined their control in other regards, taking upon him the sole burden and responsibility of Administration. That he was justified in taking this position in law there can be no doubt, the time for Responsible Government had not come.

It may perhaps be of interest here to say that the Act of 1774 was fiercely opposed in the Imperial Parliament. I copy part of a paper read at the May meeting, 1917, of the Royal Society of Canada. (Trans. R.S.C. for 1917, pp. 81 sqq.) Some Origins of the British North America Act, 1867.

"There was some excuse for Thomas Townshend, M.P., saying that the government (1763-1770) was in fact despotic (Hansard, Vol. XVII, p. 1357).

A new period began when the Quebec Act of 1774 came into force (May 1st, 1775)—notwithstanding the vigorous efforts of the Opposition, Townshend, Dunning, Colonel Barre (who knew for a fact that the principal people of Canada "take a liking to assemblies" and "think they have as good a right to have assemblies as any other colony on the continent"), Sergeant Glynn, Charles James Fox (who urged that it was not right for Britain to originate and establish a constitution in which there is not a spark or semblance of liberty" and protested against the proposal to "establish a perfectly despotic government contrary to the genius and spirit

of the British Constitution), and Burke (who objected to the "despotic Council"), the Bill was passed. The Attorney-General, thought it absurd that Canada should have her sovereignty divided between the Governor, Council and Assembly; that he thought, would be making Canada an Allied Kingdom totally out of the power of Britain, "to act as a federal union if they please and if they do not please to act as an independent country—a federal condition pretty much the condition of the States of Germany." Sir Guy Carleton, Governor-General of Canada, being examined before a Committee of the House of Commons said that the Canadian inhabitants were not desirous of having Assemblies in the Province—"Certainly not."

The Quebec Act provided for the government of Canada by Governor and Council without Assembly, and the British Constitution was ignored.

CHAPTER III.

UNDER THE QUEBEC ACT—1774-1791.

Whatever the theories of the American Colonies and their Successors, the United States, there can be no doubt (for a British Subject) that the Imperial Parliament had the power to legislate for Canada; the King being a part of Parliament, Parliament could take out of his hands any part of the government of the Colony.

The British Government took considerable pains with the proposed legislation—the fourth draft was made before it was decided to lay the matter before Parliament (1)—in none of these was it proposed to retain the provision for an Assembly. The Act as finally passed (1774, 14 George III c. 83. Imp.) provided, Sec. 12, for the appointment by the King by warrant under the Signet or Sign Manual with the advice of the Privy Council of a "Council for the Affairs of the Province of Quebec to consist of . . . persons resident there not exceeding twenty-three nor less than seventeen . . . which Council . . . or the major part thereof shall have power and authority to make Ordinances for the peace, welfare and good government of the said Province with the Consent of "the Governor. This Act is generally known as "the Quebec Act" (2).

It is obvious that a change was made in the manner of appointing Members of the Council—from 1764 on, the Members were either (1) *ex officio* or (2) appointed under Mandamus of the King (both of these classes being selected by the Home Administration or (3) appointed by the Governor: now, all must be appointed by the Home Administration by Warrant.

Sir Guy Carleton being appointed "Captain General and Governor in Chief in and over Our Province of Quebec in America and all Our Territories thereunto belonging," his Instructions dated January 3, 1775, contained the names of the twenty-two persons appointed

Councillors (3). He was directed to notify the Secretary and the Board of Trade of all vacancies and to send to the Secretary the names and characters of those whom he thought best fitted to fill the vacancies.

The Quebec Act, Sec. 7, relieved all persons "professing the religion of the Church of Rome and residing in the . . . Province" from the Oath of Supremacy &c; but the Instructions limited this relief to (French) Canadians professing the religion of the Church of Rome—no English, Scottish, Irish or American Catholic was privileged. (4).

Specific instructions were also given as to the Appellate jurisdiction; these were incorporated in an Ordinance of February 26, 1777, (5); an Appeal was given from the "Inferior courts of civil jurisdiction . . . in all cases where the matter in dispute should exceed the sum of £10 sterling or a duty payable to the Crown, or annual rents or other such like matter or thing where the rights in future might be bound." The Governor, Lieutenant Governor or Chief Justice with any five members of the Council were to be a quorum, Judges who had given the judgment appealed from to be excluded. Where the matter in dispute exceeded £500 a further appeal was given to the King-in-Council.

The Royal Instructions to Haldimand July 16, 1779, directed that the Court of Appeal "shall consist of four persons besides the Chief Justice to be nominated by the Governor or Commander in Chief . . . from among the Members of the Council . . . together with the Judges of the Court of that District from which the Appeal does not come, the Lieutenant Governor . . . not to be one . . . five to be a quorum . . . the Chief Justice (or acting Chief Justice) . . . to be one." This instruction, however, was not carried into execution by the enactment of an ordinance (6).

As we have seen, Carleton as early as 1766 tried to ignore some of his Councillors whenever possible. In the new state of the Constitution, he continued, perhaps aggravated, this practice: the Second Article of his Instructions (7) providing that "any five of the . . . Council shall constitute a Board of Council for transacting all Business in which their Advice and consent may be requisite, Acts of Legislation only excepted," he interpreted as authorizing him to select and appoint five Councillors by name to form such Quorum constituting thereby an Executive Council and to exclude the remainder from the deliberations except in case of desired legislation.

The excluded Councillors protested; and this dispute formed at least a part of the troubles of the Governor. Chief Justice Peter Levis (8) moved in the Council that an address should be presented

to the Governor in the premises asking that the practice should cease. For this and other offences Carleton dismissed the Chief Justice who made his way to England and made complaint to the Home Authorities. The Board of Trade made full inquiry calling Carleton and Livius before them and ultimately decided against the position taken by the former (9). This led to Additional Instructions being sent to Haldimand who had succeeded Carleton (10) and had continued his practice. Accordingly the Governor received Instructions not to select and appoint five Councillors "terming the same a Privy Council" but to summon "to Council all such thereunto belonging as are within a convenient distance." (11).

When Sir Guy Carleton (now become Lord Dorchester) was again appointed Governor-in-Chief (12) care was taken in his Instructions to give a specific direction "you are however not to select or appoint any such Members of our said Council by Name to the Number of five as you may think fit to transact such Business or term any select Number of such Members by the Name of a Privy Council but you are on every Occasion where the Attendance of the Members is necessary or required to summon all such who may be within a convenient distance." (13).

Disputes between the Council and the Governor occasionally occurred thereafter; but we do not find any further attempt to exclude any Councillor from participation in all the business of the Council.

In 1787 an attempt was made to throw the deliberations of the Council open to the public but this failed owing to the opposition of the French Members (14). One of the Members (15) had the curious notion that every British subject had a right to hear the debates of the Legislature passing laws by which he was bound.

In the same year the Council as the Court of Appeal laid down the extraordinary doctrine that in cases in which the parties were English and no Canadian (i.e. French-Canadian) was in any way concerned, the English law should be applied. This was of course a misinterpretation of the Quebec Act which by sec. 8 declared that "in all matters of controversy relative to property and civil rights resort shall be had to the Laws of Canada as the rule for the decision of the same," (16). Those advancing this doctrine however received no encouragement at the hands of the Home Administration.

During all the period from the passing of the Quebec Act until 1791, there was an almost constant agitation for and against the erection of a House of Assembly elected by the people. While there were exceptions on both sides it may be said that in Canada, speaking generally, the English speaking (or old) subjects favoured while the French-speaking, "Canadian" (or new) subjects were opposed.

At length in 1791 the Constitutional Act or Canada Act was passed which for the first time gave Canada a bicameral legislature, and therefore a real Second House. (17).

The upper part of the Province was filling up, especially after the recognition in 1783 of the independence of the United States; this was of great influence in dividing the Province into two and of introducing an elective House of Assembly.

NOTES TO CHAPTER III.

- (1) The Drafts are set out in Shortt and Doughty pp. 376-385.
 (2) Shortt and Doughty pp. 401 sqq.
 (3) Shortt and Doughty pp. 419, 420. The Council-

lors were:—

1. Hector Theophilus Cramahé or the Lieutenant-Governor for the time being.
2. The Chief Justice of Quebec for the time being. (This was at the time William Hey).
3. Hugh Finlay.
4. Thomas Dunn.
5. James Cuthbert.
6. Colin Drummond.
7. Francis LesVesques.
8. Edward Harrison.
9. John Collins.
10. Adam Mabean.
11. ——— DeLery.
12. ——— St. Ours.
13. Picodyde Contrecoeur.
14. The Secretary of the Province for the time being. (This was at the time George Pownall).
15. George Alsopp.
16. ——— De La Naudière.
17. La Corne St. Luc.
18. Alexander Johnstone.
19. Conrad Guky.
20. ——— Bellestres.
21. ——— Rigauville.
22. John Fraser.

So the names appear in the Instructions: of these, Nos. 1, 2, 3, 4, 5, 6, 7 (Francis Levesque), 8, 9, 10 (Adam Mabane) had been Members of the previous Council—the others were new appointments—their names were—

11. Joseph Gaspard Chaussegour DeLery.
12. Roch de St. Ours.
13. Pecaudy de Contrecoeur.
14. George Pownall.
15. George Alsopp.
16. Charles François De La Naudière.
17. LaCorne St. Luc.
18. Alexander Johnston.

19. Conrad Gugi.
20. Picothé de Bellestre.
21. Jean Baptiste Bergères de Rigauville.
22. John Fraser.

All appeared, were sworn in and took their seats at the first meeting of the Legislative Council held at the Castle of St. Louis, Quebec, 1777, July 9, Peter Livius the new Chief Justice was sworn in in the place of William Hey, the retiring Chief Justice (he had succeeded as Chief Justice in May of the same year), 1777, July 9, Henry Caldwell and John Drummond were sworn in, also.

1777 August 28, William Grant (afterwards Sir William Grant, Master of the Rolls in England) was sworn in.

1778 March 3, Paul Roch (de) St. Ours succeeded his father (No. 12 above).

Sir Frederick Haldimand succeeded Sir Guy Carleton in June, 1778; in his Royal Instructions, April 15, 1778, the Councillors named were Nos. 1, 2 (now Peter Livius) 3, 4, 5 (called "Cuthbert") 6, 7 (called L'evesque"), 8, 9, 10 (called "Mabane"), 11 ("Chaussegros de Lery"), 14, 15, 17, 18, 19, 20 ("Picotte de Belestres"), 22 Henry Caldwell, John Drummond, William Grant, Rocque St. Ours Junior, Francis Baby and De Longueuil (this was Joseph de Longueuil). Shortt and Doughty, pp. 475, 590.

In Lord Dorchester's (Sir Guy Carleton's) Instructions, August 23, 1786, the Councillors named were Nos. 1 (now Henry Hope, Lieutenant-Governor), 2 (now William Smith, Chief Justice), 3, 4, 7, 8, 9, 10 (now called "Mabane"), 11 (as in the last list), 14, 20 (now named "Picotté de Bellestres"), 22, Henry Caldwell, William Grant, Rocque St. Ours Junr., Francis Baby, De Longueuil, Samuel Holland, George Davison, Sir John Johnson, Bart., "Charles de Lanaudiere" (16) ? de Boucherville, and "Compte de Pré;" "de Boucherville" was René Aimable (de) Boucherville and "Compte du Pré", Le Conte Dupré.

(4) Shortt and Doughty, pp. 403, 420.

(5) Shortt and Doughty, pp. 464, sqq.

(6) The Instructions are in Shortt and Doughty, p. 478. Haldimand took the advice of some of his Councillors as to the advisability of passing such an ordinance. Hugh Finlay, the Postmaster General appointed by the Home Administration, approved: George Allsopp, who had been Registrar and Clerk of the Council, also approved, but suggested an amendment. George Pownall, his successor in office, advised that the consideration of the matter should be "put off till the next year or some time of more tranquility and regularity." William Grant (afterwards Sir William Grant, Master of the Rolls), approved and said, "The Court appointed may not be ideally good but it is better than the one now existing and more in accordance with the British Constitution." He adds the interesting if not convincing argument "A Court with judges who know the law is better than one with judges who have only common sense."

The Council finally decided that "the passing of an ordinance in conformity thereto (i.e. to the Royal Instructions) would neither tend to the good of the people of this Province nor to a speedier or more impartial Administration of Justice." It is apparent that the chief objection was not to the proposed constitution of the Court of Appeal so much as to the proposition that the Chief Justice of the Province (always an English Barrister) should sit and preside in the Courts of Common Pleas which administered the French Canadian law and whose judges had had much experience in that law. The proposal was that the Chief Justice of the Province should not only sit in the Courts of Common Pleas but also in appeals from the Courts in which he presided.

Shortt and Doughty, pp. 478, 479, 480, 481, 487, 488,

(7) Shortt and Doughty, p. 420.

(8) Peter Livius was apparently not English. He is said to have been the son of a German and born at Lisbon. He came to America and was for some time a Judge of the Court of Common Pleas in the Colony of New Hampshire; taking the Loyalist side, he lost his position and went to England. Much to Carleton's disgust he was sent out in 1777 as Chief Justice of Quebec to replace William Hey who had been permitted to resign. Carleton said "He understands neither their laws, manners, customs, nor their language." They never agreed; Livius in his position as Councillor was a source of constant annoyance to Carleton who superseded him (1778) in almost the last official act of his first term as Governor. Livius appealed to the home authorities with success but never returned to Canada. He enjoyed his salary, however, until the last: he was succeeded in 1786 by a much abler man, William Smith.

(9) See Shortt and Doughty, p. 476, note 2.

(10) He succeeded Carleton June 27, 1778.

(11) Shortt and Doughty, p. 476.

(12) This was October 23, 1786; he became Lord Dorchester, August 21, 1786.

(13) Shortt and Doughty, p. 552.

(14) Shortt and Doughty, p. 586.

"At a session of the Legislative Council, January 22, 1787, some sixteen citizens presented a petition requesting permission to attend the debates of the Council when Col. (Henry) Caldwell moved that any Member of the Council shall have leave to introduce any Gentleman to hear the Debates at any time except when the House is ordered to be cleared. This motion, however, was defeated by 10 to 8 all the French Members voting against it."

(15) George Pownall.

(16) Shortt and Doughty, p. 404. Chief Justice Smith's Report to Nepean is pp. 569, 570, he says: "We had but one opinion with the exception of Messrs. St. Ours and Delery two Canadian Gentlemen to whom all I said by their Inexperience in the English Language must have been entirely unintelligible."

(17) As early as October 20th, 1789, we find Grenville writing to Dorchester with the draft of a proposed Bill and pointing out that "the general object of this plan is to assimilate the Constitution of the Province to that of Great Britain as nearly as the difference arising from the manners of the People and from the present Situation of the Province will admit." He asked for such observations upon the proposed Bill as Dorchester's experience and local knowledge might suggest; and meeting Dorchester's observations previously expressed to the formation of two Provinces pointed out that whatever weight the objection might have under the existing regime, it disappeared when "the resolution was taken of establishing a Provincial Legislature . . . to be chosen in part by the People," for then "every consideration of policy seemed to render it desirable that the great preponderance possessed in the Upper Districts by the King's antient subjects and in the Lower by the French Canadians should have their effect and operation in separate Legislatures."

I subjoin here an extract from my paper already mentioned supra p. 121.

"But many English-speaking immigrants came in from the United States after the Peace of 1783, and it was decided to divide the Province into two; this was done by Royal Prerogative, but the government and constitution of the two Provinces, Upper Canada and Lower Canada were prescribed by Act of Parliament, the Canada Act or Constitutional Act.

By this time there was a great change in the official view as to the proper form of government for Canada.

In moving for leave to introduce this Bill in the House of Commons, Pitt, with almost his first word, said that it was proposed to give the Colonists "all the advantages of the British constitution." In the extraordinary debate on the Bill lasting five days, Fox said that the Bill held out to Canadians something like the shadow of the British constitution, but denied them the substance. Burke could not keep away from his *bête noire*, the French Revolution, and had to be called to order more than once, but he urged that not the bare imitation of the British constitution should be given but the thing itself. He said that "it was usual in every Colony to form the government as nearly upon the model of the Mother Country as was consistent with the difference of local circumstance." With Fox he urged that the "constitution, deservedly the glory and happiness of those who lived under it, and the model and envy of the world should be extended . . . as far as the local conditions of the Colony . . . should admit."

Seventeen years before, the Attorney-General Thurlow had thought it absurd to give Canada a Constitution at all like that of Britain—now every one believed that the Colony should have a Constitution as like that of the Mother Country as possible. Fox thought the new Constitution not democratic enough, but all thought it like that of Britain—as, indeed, it was on paper.

In the House of Lords Lord Grenville said "Our Constitution . . . the envy of every surrounding nation—they are now about to communicate the blessings of the English Constitution to the subjects of Canada because they (i.e., the Lords) were fully convinced that it was the best in the world"—and there was no dissent.

CHAPTER IV

POWER OF THE PRE-ASSEMBLY COUNCILS

As we have now reached the time when a constitution similar to that of Great Britain was intended to be granted to the Colony it may be of interest to examine what the legislative power was before this time.

In Governor Murray's Instructions December 3, 1763 (1) it was directed that "no Law or Ordinance respecting private Property be passed without a Clause suspending its execution until "the Royal pleasure should be known nor 'without a Saving of the Right of Us, Our Heirs and Successors and of all Bodies politic and corporate and of all other Persons except such as are mentioned in the said Law or Ordinance and those claiming by from and under them; and before such Law or Ordinance is Passed, Proof must be made before You in Council and entered in the Council Books that public Notification was made of the Party's Intention to apply for such Act in the several Parish Churches Where the Lands in Question lie for three Sundays at least, &c., &c."

This followed substantially the practice in the Mother Country in Private Bills legislation and the provisions were much the same as in the Royal Instructions to Governors in the English American

Colonies to the South. No instance of such an Act or Ordinance is recorded in Quebec but the Home Authorities disallowed many from the Thirteen Colonies, being inexorable in requiring the formalities, &c., to be strictly observed (2).

The Quebec Act by Sec. 12 gave the Council Power to make Ordinances for the peace, welfare and good government of the Province with the consent of the Governor; it contained no such provision concerning private bills as we have been considering, but the Royal Instructions to Carleton and Haldimand the subsequent Governors (3) have practically the same language in this regard as the Instructions to Murray.

In 1763, Murray's Instructions further provided that in all laws for raising money or imposing fines &c., express mention should be made that the same is granted to the King for the public uses of the Province and that the money so raised is to be accounted for to the Imperial Treasury and audited by the Auditor General of the Plantations or his Deputy.

It was of course part of the general policy of Britain not to make a direct profit out of her Colonies, being satisfied with the profits of commerce; as a consequence any money raised by the Colonies was to be applied to their use. Nevertheless Britain never until forced by arms in the American Revolution gave up her supreme power over the Colonies and their inhabitants and resources. This provision was a plain intimation that Responsible Government was not to have sway in Canada, the money raised in and by the new Colony was to be accounted for not to the Council of the Colony but to officers of the Imperial Government (4).

The Quebec Act is silent also on this matter but the Instructions to the Governors Carleton (1775 and 1786) and Haldimand (1778) contain the like clause (5). Murray's instructions further provided that no law which (a) might tend to affect the Commerce or Shipping of the Kingdom or (b) should in any way relate to the Royal Rights and Prerogatives or (c) the property or subjects or (d) should be of an unusual or extraordinary character should be approved without the signification of the Royal pleasure (6).

(a) It was the settled policy of the Board of Trade to look upon the Colonies primarily as markets for British manufactures and as suppliers of raw materials; sometimes indeed shipbuilding was encouraged in America but as a rule the American shipowner was not encouraged. Many disputes took place between American Colonies and the Board of Trade, the former looking to local profit the latter to advantage to British Commerce and shipping.

This was changed after the Quebec Act; in Carleton's Instructions it reads thus: "No Ordinance be passed relative to the Trade, Commerce or Fisheries of the said Province by which the Inhabitants thereof shall be put on a more advantageous footing than any other of His Subjects either of this Kingdom or the Plantations." Much trouble had been experienced from the American Colonies levying retaliatory duties on each other's products, making laws which laid a burden on English merchants and the like (8). This was to prevent such practices in Canada.

(b) The Royal Prerogative was an elastic term and convenient as elastic; scarcely anything could be done by the Colonies in the way of self-government but the High Tory might consider it an encroachment on the Royal Prerogative while scarcely anything could be such an assertion of independence that it might not by a complaisant monarch or his advisers be considered compatible with his Royal Rights (9). The clause does not call for particular attention.

(c) Interference with the rights of private persons is always a serious matter; no one can doubt the Power of the Imperial Parliament in the premises but this was forbidden the Colonial Legislatures (10).

(d) Laws of an unusual or extraordinary character were not uncommon in the American Colonies (11).

These provisions (b), (c) and (d) disappear after the Quebec Act but there is no reason to suppose that had any legislation of the kind been passed it would have received the Royal assent.

Murray's Instructions (1763) also recited difficulties arising from the enactment by the American Colonies of Laws for so short a time that they expired before the Royal Assent or Refusal could be obtained and he was directed to refuse assent to any law enacted for a less time than two years, except in case of imminent necessity or immediate temporary expediency; moreover he was not without express leave to permit a law to be reënacted which had failed of the Royal Assent, nor to permit a law to be repealed (which had once been approved) without a clause suspending its operation until the Royal pleasure should be known (11).

The temporary Act was a well known means of evading the directions of the Board of Trade (12) and equally well known were the re-enactment of laws already disallowed and the repeal of those which had been approved and confirmed (13). The same clause is found in the Royal Instructions after the Quebec Act (14).

We may pass over the purely directory clauses in Murray's Instructions, mentioning only that all Ordinances were to be transmitted in three months or sooner to the Board of Trade (15).

After the Quebec Act the time is extended to six months following section 16 of that Act and the Ordinances were to be sent not only to the Board of Trade but also to one of the Principal Secretaries of State (16).

The Council were still further restricted after The Quebec Act; Carleton's Instructions (1775) afterwards repeated to Haldimand (1778) and himself (1786, then become Lord Dorchester) prevented the Council from levying any taxes or duties, except such rates and taxes as the inhabitants of a Town or District might be authorized to assess for making roads, erecting public buildings or the like for the local convenience (17).

No such legislation had in fact been passed by the Council unless indeed the fees charged for licences to sell liquor could be so considered (68).

Carleton's Instructions (1775), also directed that "No Ordinance touching Religion or by which any Punishment may be inflicted greater than Fine or Imprisonment for three Months be made to take effect until the same shall have received our Approbation" (18) and that "no Ordinance be passed at any Meeting of the Council where less than a Majority or at any time except between the first day of January and the first day of May . . . unless upon some urgent Occasion; in which case every Member . . . resident at Quebec or within fifty miles thereof shall be personally summoned to attend" The latter simply upheld the provisions of Section 16 of the Quebec Act, and the former, Section 15.

The Council were in Carleton's Instructions (1775), not to lose sight of the importance of personal liberty and were told that they could not follow a better example than the Writ of Habeas Corpus (19). Many of the petitions by the English-speaking inhabitants had bitterly complained of the absence of such a remedy and it was thought well to introduce it. But the troubles arising from the American Revolution prevented immediate effect being given to the recommendation. Haldimand imprisoned more than one person arbitrarily—(whether this was necessary or not we need not here enquire). The Instructions had been repeated when Haldimand succeeded Carleton in 1778 but it was not till April 29, 1784, that an Ordinance was passed bringing the Writ into force in Canada (20).

The Instructions to Dorchester in 1786 contained a clause directing him to "take effectual Care that the said Ordinance be duly enforced so that every Security to Personal Liberty . . . may be fully enjoyed . . . in the Province" (21).

The Royal Assent was provided for from the beginning. In Murray's Instructions, there was a provision that until the calling of

a General Assembly the Governor by the advice of the Council might make Rules and Regulations (22) for the Peace Order and Good Government of the Province which were to be forthwith transmitted for the Royal Approbation or Disallowance (these Rules and Regulations were in no case to affect the life, limb or liberty of the subject or to impose any tax or duty) (23).

After an Assembly should be called all Laws, Statutes and Ordinances were to be transmitted within three months to the Board of Trade (24). These provisions also appeared in the Instructions to Carleton (1768) (25).

The Quebec Act Sec. 14 provided that every ordinance should be transmitted within six months for the Royal Approbation and if it should be disallowed it should cease to be in effect from the promulgation in Quebec of the Order in Council disallowing it (26); this was included in the Royal Instructions to Carleton and Haldimand (27).

The number of Councillors was fixed in 1763 at eight in addition to the four who were Councillors *ex officio* (and also to any appointed immediately by Royal Warrant). The quorum was 5 (28).

In 1768 when Carleton succeeded Murray eleven persons are named in the Royal Instructions altogether including the Chief Justice; and provision was made for new appointments by Carleton so that there should always be at least seven within the Province (29). There is no provision for a quorum; the common law rule would therefore apply and the quorum would be a bare majority of the members.

After the Quebec Act, in Carleton's Instructions 1775 there are twenty two Councillors named; the Act Sec. 12 makes the major part of the Council a quorum for legislation but the Instructions prescribe five for all business except legislation and for legislation a majority of the whole (30).

When Haldimand succeeded Carleton in 1778 there are twenty three Councillors named and the provision is made for a quorum (31).

In 1786 Dorchester has twenty three Councillors named; the quorum as in 1778 (32).

Murray 1763 was given power to fix the time and place of meeting; Carleton in 1768 was confined to the Town of Quebec (which was appointed his place of residence). After the Quebec Act in 1775 Carleton received instructions authorizing him to call the Council together at such times and places as he should think proper except for purposes of legislation in which case the Town of Quebec was prescribed. Haldimand in 1778 and Dorchester in 1786 received the same Instructions (33).

In all cases after the Quebec Act the Instructions also provided that no Ordinance should be passed (except upon some urgent occasion)

except between January 1 and May 1; in Dorchester's Instruction in 1786 there was a further provision that in the case of an urgent occasion every member resident at Quebec or within fifty miles thereof must be personally summoned (34).

NOTES TO CHAPTER IV.

(1) Shortt and Doughty, p. 132, sqq.

(2) Dr. Dickerson (in the work cited p. 113 ante note 5 to Chapter I), at pp. 256 sqq., gives many instances. Apparently the first instruction of the kind was in 1715 in Massachusetts which required a clause saving the rights of the Crown and of all persons not named in the Act; in 1723 a further instruction required the Act to be suspended until the Royal pleasure should be known. The learned author says p. 258, "The Board (of Trade) was quite inexorable when such a law failed to indicate that due notice had been given of the application for such a bill." See Instructions to Carleton 1768, Shortt and Doughty, pp. 210 sqq.

(3) Shortt and Doughty, pp. 419, 474, 552 sqq.

(4) See Instructions to Carleton 1768, Shortt and Doughty, p. 213.

(5) Shortt and Doughty, pp. 419, 474, 552, sqq.

(6) Shortt and Doughty, p. 136. The same provision is found in the Instructions to Carleton, 1768, Shortt and Doughty, p. 213.

(7) Shortt and Doughty, p. 422. This is repeated in the Instructions to Haldimand, 1778, and to Dorchester, 1786. Shortt and Doughty, pp. 475, 554.

(8) Dr. Dickerson, p. 248 sqq., gives a number of instances e.g. North Carolina levied a duty on Indian traders from Virginia by an Act which was repealed in 1709; Massachusetts in 1721 laid retaliatory duties on the products of New Hampshire; Virginia laid a high import duty on the tobacco of North Carolina; South Carolina taxed naval stores imported from the north. British merchants complained bitterly of Virginia and New York laying a heavy import duty on slaves, etc.

(9) Examples are laws tending to hamper the Home Government e.g. Acts by certain states to fix the period of their Assemblies thereby taking away from the Governor his power of proroguing and dissolving them. See Dickerson, pp. 228, 229.

(10) E.g., An Act of Pennsylvania in 1718 placing the property of a deceased in the hands of trustees for sale without safeguarding the rights of the minor heirs to whom it belonged, was vetoed, Dickerson "American Colonial Government," p. 259. New Jersey suspended civil actions from February to September, 1748. Virginia in 1729 limited liability on obligations for judgments, bonds, etc. New York in 1731 passed an Act preventing levying on specialties more than the principal, interest and costs of suit, &c., &c. Dickerson "American Colonial Government," p. 253.

(11) Examples given by Dr. Dickerson are a Virginia Act of 1732 which allowed a married woman to dispose of her land by deed or will during her husband's lifetime, p. 260; A similar Act of Massachusetts in 1762, ditto p. 261. An Act of Pennsylvania in 1755 exempting two persons named therein from prosecution for debt for a term of years ditto, p. 261; an Act of South Carolina, 1723 (of 1733), altering a will by taking the property from one son and giving it to another, ditto p. 261, &c., &c. These it may be remarked are also abnoxious to provision (a).

(11) Shortt and Doughty, p. 136.

(12) See Dickerson, p. 273.

(13) See Dickerson, p. 262. Examples given by Dr. Dickerson are Virginia Acts of 1705 for the better regulation of William and Mary College; the Acts of

Virginia (1705 and 1725) declaring Slaves to be real estate which were not allowed to be repealed so as to make Slaves personal estate—the Author adds “Scores of similar cases could be cited,” p. 262.

The same provision appears in Carleton's Instructions (1768). Shortt and Doughty, p. 214.

(14) Shortt and Doughty, pp. 422, 475, 554, 555.

(15) Shortt and Doughty, p. 136. This is repealed in Carleton's Instructions (1768), p. 213.

(16) Shortt and Doughty, pp. 422, 475, 555.

(17) Shortt and Doughty, pp. 421, 475, 554.

(18) July 7, 1766, and Ordinance was passed by the Council that no one should “sell by retail Rum, Brandy, Wine, Syder or other spirituuous and strong Liquors, mixt or unmixed . . . or keep any common Tippling House or Victualling House without License”: the license cost 36 shillings (\$7.20)—2s (40 cents) to the Clerk of the Peace, 8s (\$1.60) to the Deputy-Secretary, and the remaining 26s (\$5.20) “to be appropriated to publick Uses as the Governor and Council shall think proper.” “Ordinances Made and Passed, &c.” pp. 82, 83.

(18) Shortt and Doughty, p. 422. This is repeated in the subsequent Instructions, Shortt and Doughty, pp. 475, 554.

(19) Shortt and Doughty, p. 423.

(20) 24 Geo. III C. C, “Ordinances, &c.,” pp. 139 sqq. Perhaps the *Pierre Du Calvet* case is the most celebrated of Haldimand's alleged misdeeds in that behalf. Du Calvet on being released brought an action in the English Court of King's Bench against Haldimand; it never came to trial as the unfortunate plaintiff was drowned on his return from this Continent to which he had come to collect evidence: *Actio personalis moritur cum persona*. I have examined the facts of the case in a paper read before the Royal Society of Canada (not printed).

(21) Shortt and Doughty, p. 555.

(22) There is no substantial difference between Laws and Ordinances, Rules and Regulations.

(23) Shortt and Doughty, p. 135.

(24) “ “ p. 136.

(25) “ “ pp. 210 sqq.

(26) “ “ p. 405.

(27) “ “ pp. 422, 475, 555.

(28) “ “ pp. 132.

(29) “ “ p. 219.

(30) “ “ p. 420.

(31) “ “ p. 475.

(32) “ “ p. 552.

(33) “ “ pp. 420, 475, 554.

(34) “ “ p. 554.

**A Contemporary Account of the Navy
Island Episode, 1837**

by

The Hon. William Renwick Riddell, LL.D., F.R.S.C.

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A Contemporary Account of the Navy Island Episode, 1837

THE HONOURABLE WILLIAM RENWICK RIDDELL, LL.D., F.R.S.C.

(Read May Meeting, 1919)

The following account of the destruction of the "Caroline," etc., was written by George Coventry at the time, in order to be sent to England, where his people resided. It is dated at Chippewa, Upper Canada, 1838, and is in the form of a letter to his sister in England.

George Coventry, whom, when I was a boy, I knew in Cobourg, was born at Copenhagen Fields House at Wandsworth Common in the house "at the corner near the city road" and "within the sound of Bow Bell." His father was a ward of Baron Dimsdale of Thetford, and was placed by his guardian with Jones, Havard & Jones, merchants, in London. His mother was Elizabeth Thornborrow, from Lupton Hall, Westmorland, who was visiting at Sir Joshua Reynolds', when she was won by Coventry. Coventry, Senior, was afterwards a member of the firm of Jayson & Coventry, and seems to have been a man of literary tastes and considerable ability. The son was born on 28th July, 1793. He had the misfortune to lose his mother who died of cancer when Coventry was three years old. The lad was then placed in a Ladies' School, at Peckham, Surrey, kept by Mrs. Freith and her three daughters, one of whom, the elder Coventry afterwards married.

George Coventry was then sent to a Boys' Boarding School at Hitchin, Hertfordshire, kept by Mr. Blaxland, where he stayed for about three years. On the death of Mr. Blaxland, his undermaster, Mr. Payne, started a school near Epping Forest, which young Coventry attended until his fourteenth year when he was sent to Dover where he completed his education. He afterwards engaged as an employee in his father's firm, and in that capacity travelled over the greater part of Great Britain. He also visited France, where he thinks he saw at Fontainebleau some flowers, the offspring of certain plants which he had seen leaving Dover, a present from the Queen of England to the Empress Josephine. He came to Canada in the fourth decade of the 19th century, was an eye-witness of some of the occurrences of the Rebellion of 1837, and returned to England in 1838. Returning to this Province he lived for a time in St. Catharines; afterwards he was in Cobourg, then in Picton as editor of a paper there, then he returned to Cobourg and made that his home for the remainder of his life. He died at Toronto, February 11, 1870, and is buried in the St. James Cemetery at Cobourg.

He left at his death a considerable mass of manuscripts, one being "The Concise History of the Late Rebellion in Upper Canada" from which the accompanying is taken. The greater part of this history, which runs to about 20,000 words, is familiar ground; it does not differ from the current accounts of the rebellion and no small part of it is invective against Mackenzie and his followers. I have therefore not thought it worth while to copy all of it.

Coventry also left a considerable mass of poetry, more or less good; amongst the manuscripts is one seemingly based on Chaucer, which purports to be a poetical account of a fishing and hunting party at Rice Lake—it brings in a great many persons who were well known in Cobourg, Port Hope and the township of Hamilton, and each one of these is made to tell a story. At the present day, the stories are rather vapid and of little interest to anyone except those who were acquainted with the persons to whom they are attributed—I knew most of them by sight and all by name.

He also left a manuscript, "Reminiscences," which contains an account of his life up to the end of the second decade of the last century. He gives an interesting story of John Wesley, which I attach to this paper, and he also has the following:

"I was at Vauxhall the night that George IV died. Everyone was in full black dress, which gave the Gardens a most remarkable appearance. Such a sight will never be seen again, for they are now abolished."

Coventry was employed by the Government of Canada to collect material for the history of Canada, and it was through his efforts that the "Simcoe Papers" were obtained.

According to my recollection, Coventry was a man of fine presence and dignified bearing, and with the courtesy of an English gentleman. I have no reason whatever to suppose that he has misrepresented anything, although his account of the destruction of the "Caroline" does not agree in all respects with that given by Dent and others, nor with that given by an officer "G. T. D." (the late George Taylor Denison, Sr.) in the *Canadian Monthly* for April, 1873, Vol. 3, p. 289.

ANECDOTE OF JOHN WESLEY

"In after years my father often narrated events that happened at that period; not the least remarkable was the following:

"There was another quiet house not far distant from Wandsworth Common at which the celebrated John Wesley visited, and my father being a neighbour was sent for when John arrived on his visit,

which was pretty frequent. The little coterie assembled was more like a quiet Methodist meeting than a feast, there being some 20 or 30 generally present. Among these seekers of truth was an old man who knew the Bible by heart. His name was Samuel Best, who went under the cognomen of 'Poor Help,' as an innocent-minded man. The tea and evening passed pleasantly enough, all edified with Mr. Wesley's account of his voyage across the Atlantic. When the hour of ten announced the time of his departure, he being an early man and an early riser, his coat was brought and as was his custom he went round the room and shook hands with all present. On accosting 'Poor Help,' he remarked: 'Why Samuel, thee have been unusually silent this evening. I have not heard thee speak a word. There must be something remarkable on thy mind.' To which Sam replied: 'Yes, John, there is, and I cannot refrain from telling thee what it is, "Set thine house in order, for thou shalt die and not live." ' My father said the affair was taken in good part; but whether it operated on a mind at all times inclined to be superstitious, it is a singular fact that Wesley died in less than a fortnight, March, 1791. At this period my father was a bachelor, not being then of age.

"When I paid a visit to England in 1838 to see my father for the last time, I was one morning strolling around the Bricklayers' Arms, Kent Road, waiting for the Brighton stage, when I was arrested by a railing around an old church yard, and on peeping through, the first tombstone that caught my eye was the following!

'Here lies
Samuel Best,
Commonly called
Poor Help.
Aged 93.

"This was the identical man who gave John Wesley his warning to prepare for death. There are many remarkable circumstances connected with Sam Best which can be found in the magazines of the day; but Southey, in his life of Wesley, has not mentioned this, and perhaps never heard of it, although perfectly true.

"My father still continued to visit at this conference where he formed an intimacy with Sam Best, who gave him several texts of scripture applicable to his future movements in life. Strange to say he would never show them to any one, but he told me in after years that every one came true. He had great faith in Best's discrimination of character and looked upon him as a prophet.

"The King went one day in disguise with Lord Sandwich and two or three other eminent men. Best looked hard at the monarch, whom

he had never seen, and told him to write down in his Tablet, Proverbs, Chap. 25, verse 5. After a little conversation the party retired. On reaching Saint James, the King turned to his Bible and read aloud to his courtiers, 'Take away the wicked from before the King and his throne shall be established in righteousness.' Sandwich was very angry with old Best, as well he might; but the King ever after was a friend to him and said he should never want, which was verified."

So far I have copied accurately the manuscript of Mr. Coventry. There is, however, a good deal about Mr. Best which he does not seem to have known. The D. N. B. gives us most of the following:

This pretended prophet, Samuel Best, was born in 1738, and before he was 50 years of age he had become an inmate of the Work House at Shore Ditch. His life before that time is rather obscure. By some he is said to have been a Spitalfields weaver and by others a servant in different establishments in the city of London. Before he was 50 years of age he disowned his children, he discarded his original name and took that of "Poor-help" (not Poor Help as Coventry thinks), describing as he thought his special mission.

He was a visionary and enthusiast, not wholly unlike his contemporary, the celebrated Richard Brothers who came from Newfoundland. He probably was a little touched with insanity and probably believed in his own prophetic and supernatural powers. He was in the habit of receiving his visitors, we are told, in a room adorned with fantastic emblems and devices; he would inspect the palms of their hands and from them give an outline of their past lives. He would also furnish guidance for the future in phrases of scripture, just as he did with Coventry's father; he also believed, or at least claimed, that by licking the hands of his patients he could determine the disease with which they were afflicted.

After acquiring considerable notoriety he removed to a house in the Kingsland Road and was consulted by many of the upper classes whom he also visited at their own homes. He professed to eat no food but bread and cheese and to drink only gin tingured with rhubarb. He spent his nights, as he claimed, in communion with the celestial powers. For the last 30 years of his life he was convinced that he was to be the leader of the children of Israel to rebuild the city of Jerusalem. In that regard he imitated Richard Brothers, who about the same time, that is, the latter part of the 18th Century, gave himself out as a descendant of David, declaring that he was to be revealed as Prince of the Hebrews and Ruler of the World.

Brothers was more fortunate in some respects than Best in that he convinced many educated Englishmen, members of Parliament

amongst them, of the verity of his claims, while Best never had any great following. Best, however, had the security of mediocrity, for he ended his life in peace and without prosecution, dying in 1825, while poor Brothers was first charged with treasonable practice and confined as a criminal lunatic, and was subsequently removed to a private asylum.

We have at the present day some instances of the same kind of prophet. Joseph Smith was a strong example, and since his time we have had the Holy Rollers, the Holy Ghost and Company, and like bodies of visionary enthusiasts.

Some of them are still with us.

COVENTRY'S ACCOUNT.

Grand Island belongs to our Neighbours, therefore to secure themselves from Molestation, they [that is Mackenzie's Forces] agreed to make the Conquest of Navy Island belonging to the British Government, and inhabited only by one old Woman and her daughter, whom they sent over to Grand Island in snug quarters there at a Log Hut within sight of their previous location.

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That no opposition should be made to their landing, they kept the place of their destination a profound secret, and marched through a Wild forest for four or five Miles, frequented by Nothing whatever but Deer and Wild Cats.—It so happened however, that early intelligence reached us, and had it been acted upon promptly, the whole trouble, confusion, expence and Inconvenience, might have been Easily avoided. It was early in the Morning of the 11th of December, I was at Captain Ussher's, when a respectable farmer called to give his deposition relative to their Movements. He stated he wished to do so from a fear that his Cattle and property would be plundered by these Brigands on their March. He owned a large farm on Grand Island as well as 300 acres of Land in Upper Canada—and therefore claimed our protection, by dispersing the pirates as quickly as possible. He happened to be at Tonawonta at the very time when they embarked—suspecting their place of destination, which on Enquiry was Confirmed, he hastened thro the Island to the shore—took his Canoe—came over and gave us the Information. This was the first Intelligence that reached us—we took down his deposition in writing—witnessed it, and after breakfast, Captain Ussher mounted one of his Horses and rode off to the Commanding Officer¹ then at Fort Erie to give him Intelligence.—It was considered an event so highly improbable, that

no further notice was taken of it, further than passing the Communication on to another quarter; we were displeased, being firmly convinced that the farmer's testimony was implicitly to be relied on, but having No authority to act, nothing could be done, altho' Mr. Ussher volunteered for one to go over and keep guard—there were also numbers in readiness to join him.—The remainder of the day, we kept a sharp look out, allowing no Boats to pass without permission of a Magistrate, yet notwithstanding our vigilance some spies had been Known to Cross, higher up the River.—One of these, however, Corroborated the farmer's Testimony by mentioning the Circumstance at a small Tavern about $\frac{1}{2}$ Mile distant, where I called every hour to ascertain if there were any suspicious Characters.—At four o'clock in the Morning, we went down to Chippewa and stated this fact also—but the Colonel was as little inclined to belief as the other; he promised however that a conference should be held in the Course of the day—which was accordingly done, but the golden opportunity was lost, by reason of the Time that elapsed in passing, repassing and conferring together. A handful of Men at that Crisis would have prevented the direful disasters that afterwards occurred. I wished for the spirit of Lord Peterborough's Movements, at that Juncture to act promptly, in order to prevent the annoyance which must inevitably arise from those Marauders taking quiet possession of an Island, from which, if they intrenched themselves well, they could with difficulty be removed.—The Militia are all very well as Secondaries, but from the Circumstance of being so little engaged in Warlike operations, they make but poor primaries in a case of Emergency of this kind.—This does not arise from any defect in personal Courage, because the late Events have proved this fact to the Contrary. It arises from a want of organised plans and extension of service, to teach them the importance of every position and advantage to be taken of the Movements of an Enemy, which can only be acquired by tact and Experience.

I nevertheless agree with my friend, that common foresight and prudence, should have induced the Colonel of the District, in the absence of any Regulars, to send over a guard to the Island, knowing, as he must have done, that Mackenzie was in Buffalo, inflaming the Minds of the People to revolt against us.

From ocular demonstration, it was proved, on the following day,² that our Information was Correct, for we could plainly see the pirates, walking around the Island, and preparing their fortifications.—All Night long, the axe was heard, felling Trees for breast work, and the Constructions of Shantys, as temporary huts to shelter them from the

Cold, until they could convey lumber over for building, which was soon effected, necessity being with them the rallying point to raise quarters as speedily as possible, not only for themselves, but from the Anticipated Kentucky boys, we could see them cutting down and carrying away fern and brushwood for Beds to repose on: they kept up large fires, most of them being apparently accustomed to Night Campaigning in the open air.

Dreary as our Midnight patrolling was before the arrival of the *General* and his advanced Guard, you may readily suppose, we were no better off after the arrival of our piratical Neighbours whose plans we were totally ignorant of: they might come over in Boats, burn the Houses and pillage the Country, then return with the greatest alacrity without being Caught, for we had as I before stated, no other Guard along the frontier. Fortunately, however, they were too closely engaged in their Military Tactics and Shanty building to trouble us, although the circumstance of their being armed and not knowing precisely their Numbers, was a source of great alarm all around the Country.—

The very possession of our Soil, small as the Island is, aroused the Indignation of the Loyalists, and prompted them to greater exertion than they had hitherto manifested. The News, which had gone forward to Toronto as doubtful, was no sooner confirmed than Volunteers marched from all quarters, and dispatches forwarded to the Lower Province, to recall all the regulars they could spare. Order being partially restored in that quarter, since the destruction of Saint Charles and the flight of the prominent leaders, the Troops promptly obeyed the call and prepared for departure.

In Common Seasons, their transportation by Water would have been Impracticable, such an Occurrence being rarely remembered of Steam Boats plying towards the End of December. This Season however, as if aided by a superintending power in favour of our cause, was mild, enabling the Boats to run without interruption from the Ice. Detachments of the 24th and 32nd regiments quickly arrived at Toronto, from whence they rapidly pushed on, without the harass and fatigue of travelling by Land.—Whilst these brave fellows were on their route, Volunteers from various districts had arrived from as far North as Port Hope, Cobourg, Prescott and other Settlements along the Lake Shore.—Colonel MacNabb³ also had returned from the West and pushed on with 300 Men, joined by Captain Kerr and his 200 Indians, who had painted their faces Red, a custom among them on warlike Expeditions.—We were not a little pleased at their arrival, having some chance of being relieved on our Midnight Guard.

The quiet Village of Chippewa suddenly assumed quite an animated appearance from the Influx of so many strangers. So rapid had been the Movements of the Troops that in a very short time upwards of 4000 had arrived to our protection.—Bands of Music — Bugles — Marching — Countermarching — drilling—firing— Cannon exercising—the bustle and stir of the Commissariat department—waggon loads of Bread—Beef, pork & potatoes moving along the road from the surrounding farms—presented a spectacle quite Novel to me, who for the first time was located in the very heart of the Contending parties—Private Houses were all turned into Barracks and the Methodist Chapel into a Hospital—our worthy Clergyman turned the sword of the Spirit into an Instrument of war, nothing in fine being thought of but preparations for defence in the Event of an Invasion—This all-engrossing Topic superceded every other consideration.

I should tell you, that in conformity with the Colonel's assurance, preparations were made for going over to the Island to make remonstrance against American Citizens taking possession of our Territory.⁴ Accordingly, some of the Magistrates, accompanied by Volunteer rowers, proceeded on their way thither. This was an ill-judged Experiment,⁵ as they must have been aware that the Brigands were too numerous and too well armed to allow them to land, although it was their policy to have done so, which would have secured the party prisoners, and secured the Boats.—Willing, however, to shew us that they, in reality had commenced their fortifications, and possessed Cannon;—so soon as the Boat neered the Northern Extremity of the Island, they opened their Battery and fired a Six pounder upon the adventurers. This was too warm a reception, so they deemed it most prudent to return, which they quickly did, without accomplishing the End in view. Two or three more shots were fired, but without effect, their artillerymen not being in sufficient practise to level a good aim, or make that allowance in the art of Gunnery with a Moving object, so as to do any injury.

So incredulous were the authorities in power, as to their numerical force, considering that merely a few lawless fellows had gone there on a freak, that they determined on another Experiment, which took place shortly after, and would doubtless have succeeded had they manned a sufficient Number of Boats. Unluckily however, as I hinted at the outset, we had no Boats of any consequence, but they were very quickly supplied from Queenston and Elsewhere. The Sleighing being good, a grand Movement took place, and it was really curious to see the rapid arrival of so many Boats. In a few days,

near 100 were collected together. I saw one Immense Boat that would hold 50 men, drawn all the way from Hamilton, a distance of 44 miles, by 36 oxen,—a sight, I shall in all probability, never witness again. Schooners also were ordered from the shores of Lake Erie, and every other kind of craft that the Country possessed.—The two first Boats were soon brought into service, without waiting for a general attack, which, at one time, was determined on. These were manned by a reconnoitering party,⁶ consisting of Intrepid young fellows, who had freely volunteered their services. The current being strong, they were towed up the river a little beyond Mr. Ussher's.—The party, consisting of Six in one boat, and Eight in the other, proceeded towards the Island, intending to row down the stream between Navy and Grand Islands. The object in view, was to ascertain what force was stationed at the back part, where the old lady's cottage stood, then taken possession of by VanRanselaer and Mackenzie, with their aid de Camps.

No sooner however, had they reached the line opposite the extremity of the Island, than a brisk Cannonading, with 6 pounders, opened upon them. It was an interesting and Novel sight, tho' an alarming one, lest our brave Countrymen should be swamped by a Cannon Ball. At the first fire, we distinctly saw where the ball struck the water, well directed as to the line, but too much elevated, so that the Ball passed over their heads, and struck some distance off.—The second shot was better directed and fell very near the bow of the Boat.—Finding it would be impracticable to get round, they rowed back and returned to Chippewa, about Midway in the Current on this side, but sufficiently near to the Island for any experienced Rifleman to have done great execution. By this time, a vast number had assembled with their rifles, who kept up one incessant firing, but all to no effect. I should think at the least, there were 200 balls fired, still no harm done, which satisfied us there was less to fear from the Brigands than had, by many, been anticipated, although it had been given out that their aim was as unerring as the Indians.—Whilst the Boats kept gliding along, our fine fellows only laughed at them, twirling, at the same time, a Hat at the End of a boarding Sword, with which they were all well armed, as well as pistols. Before they cleared the Island, another Cannonading commenced, with similar ill-success. The ruffians discharged 7 Six pounders, but none near Enough to either Boat even to splash them. One Ball, I noticed, dropped in the water, midway between the 2 Boats. This was the second best shot that was made.—On reaching Chippewa, they gave 3 cheers, and landed amid the applause of the bystanders.

After Mr. Ussher had played "God Save the Queen" on his Bugle, we walked down to see the results. I examined the Boats carefully, but no symptoms of a single bullet mark, out of the 200 fired on the Occasion, convincing us, that the recruits must be better practised in the art of Gunnery, before they attempted to cross over and pay us a visit.

These reconnoitering parties ceased soon afterwards, and a Council of War was held as to the best course to pursue to dislodge the Marauders. It was desirable, if possible, to spare the effusion of human blood, and on this account, it was considered advisable to act on the defensive, particularly as our reinforcements were numerous, and detachments arriving daily from distant districts. The Jewish Monarch declared formerly, that in the multitude of Councillors there is safety:—Unfortunately however from there being too many, the Country was harassed much longer with apprehensions of alarm than was consistent with the general character of the British Nation. This Indecision was afterwards a source of reproach by the American Authorities, who considered that it was our duty to remove a lawless band, who had taken possession of our soil, contrary to the existing Treaty between the two Countries.—Colonel McNabb was of opinion that the first shedding of blood by forcibly removing them, would weigh but trifling in the scale of Contention and prevent numbers afterwards falling a Sacrifice by the Sword, an Idea which was looked upon by the most Intelligent Men as a moral Certainty: indeed it was on the Eve of being accomplished, but afterwards Countermanded.—A plan of the Island was drawn by my friend Captain Ussher and Myself, where every spit was marked, so intimately acquainted were we with its location, from having gone over so frequently on shooting expeditions. This was forwarded to the Governor, preparatory to his taking a circuit along the frontier.—

Whilst the subject of attack was under Consideration, various Magistrates assembled at Fort Erie in Council, who drew up a remonstrance, signed by Mr. Merritt, chairman, requesting the Mayor and Authorities at Buffalo to inform them whether the aggression complained of were noticed by them, or in any way sanctioned, or whether in reality, any preparations were making for hostilities—an Event wherein there appeared some probability, from the circumstance of Drummers parading the streets of Buffalo on recruiting Service.—

Dr. Trowbridge, the Mayor, an Intelligent and highly reputable Man, finding the enthusiasm of the people had gone beyond the power of the Law to restrain their proceedings, resigned his situation in

favour of Mr. Barker:—previous to this, however, he wrote a reply to the Magistrates assembled at Fort Erie assuring them that every thing practicable would be done to restore order, and that, so far from the Government wishing to sanction the proceeding of the Rabble, every precaution would be taken to allay the excitement.

“Had these resolutions been promptly followed up by the Marshall and others in Authority, quiet would soon have been restored, and the rebellious faction disbanded—but a strong party of speculators arose in their favour and winked at their proceedings, allowing Boats to convey arms, Ammunitions and provisions to them, which might easily have been prevented. Certain Authorities even saw Cannon with the United States mark upon them, and yet took no measures to secure them or to detain the parties who were known to be the pilferers.—

A steam Boat⁷ was also hired for the conveyance of recruits, arms, Ammunition, etc., to the Island, which had arrived from Rochester and other districts on Sleighs, where the Jurisdiction of the Marshall extended.—A guard also, in time of peace, being allowed to watch the Boat at Night, without any warning that it was an infringement of Neutrality was truly unaccountable.—Strange as this conduct may appear to you, I have it from the best information—gentlemen who were over there when the Marshall conversed with Van Ransellaer and who saw a Cannon in his Boat belonging to the American Government.

Conduct so reprehensible, could not escape the Censure of our Authorities, who, finding that so much listlessness and apathy prevailed, considered it high time to look out for themselves, having previously ascertained that the American Militia refused to act.—

All these circumstances being taken into consideration, a Council of War, which was held at Chippewa, determined upon some vigorous measures to prevent further aggressions upon our Territory, and to open the eyes of the deluded Buffalonians, as to the impolitic course they were pursuing.—They would have rejoiced had the Authorities on the other side done their Duty, by putting a stop to Innovations so hourly Notorious. After allowing the American authorities a fortnight, and finding all their remonstrances unavailing, they determined to act decisively and to perform that Service which it was the bounden duty of the American Government to have done themselves. No alternative remaining, six⁸ Boats were manned, under the Command of an intrepid officer, Captain Drew, with instructions from Colonel McNabb to proceed at Night and take possession of the piratical

Steam Boat, the "Caroline," which was known to be illegally conveying Cannon, Arms, Ammunitions, recruits and provisions over to the Marauders and rebels on Navy Island.—She was seen plying on the afternoon of the 28th⁹ and not returning, was supposed she would moor there for the Night.—In whichever case, however, they were to take possession of her at all hazards.—Accordingly about 10 o'clock at Night, the preparations were completed and the Boats manned and well-armed for the Expedition—a more hardy, or intrepid set of fellows could no where be found, all in good spirits, and ready to achieve any event however hazardous.—On nearing the Island, they found that the said Steamer had left in the Evening for Schlosser on the American shore thinking to be protected and beyond our Control, but the result proved the Contrary. The first two Boats Kept ahead of the rest, having more experienced rowers and on arriving alongside, were hailed by the Sentry for the Countersign.—No satisfactory answer being given, the party on guard fired, but without effect; the Boat was soon boarded and taken possession of, but not without the loss of several lives in the Confusion that ensued.—This is a brief outline of the proceeding, columns of which have been written on the subject containing more untruths than I need trouble you with.—As the Current was too strong towards the rapids and falls, to tow her over, which was the original intention, she was set fire to, in three or four different places—unmoored and allowed to drift her course over the falls, a species of Navigation that was certain to consign her to oblivion for Ever. The Night was very dark, consequently, as you may suppose, it was a very grand sight, to see her gliding with the Current towards the whirlpool of her destination, whither she in due time approached and no vestige of her remains ever seen afterwards.¹⁰

The Boats quietly rowed back into the Chippewa, having two prisoners¹¹ and three of the party wounded¹², one of whom, Mr. McCormack, suffered severely, and afterwards received a Pension for his bravery—the other two soon recovered.—After eliciting all the Information they could obtain from the Prisoners, they were allowed to return home the following day, it appearing that they were strangers, who had taken shelter there for the Night, the small Tavern at Schlosser being quite full.—Many others being similarly situated took to their heels as fast as they could on escaping from the Vessel. The American papers as you may suppose published the most exaggerated statements, alleging that 40 or 50 individuals were on board when the Steamer was unmoored, who had no time to escape; but this, from the Nature of things was totally impracticable, as some time elapsed in setting fire to the Vessel; she was also moored so tight with

a chain that the party had considerable difficulty in unloosing her—during these preparations therefore, ample time was afforded for any one to escape.—I saw several of the Gents who went on the expedition, the following Morning, but in the Confusion that ensued and the darkness of the Night, it was difficult to elicit the loss of the Enemy.—Mr. Chandler thought only one¹³ and three or four wounded.—Lieut. Elmsley told me he believed five or six, which I believe to be the sum total of their loss.—One only, was actually found who had acted in the capacity of Sentry—he was interred in Buffalo amidst a large Concourse of sympathizing spectators—but however many might deplore his fate, others considered he had voluntarily placed himself in danger, when ought to have been Industriouslly employed elsewhere.

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The rebels on the Island were also very Indignant at losing so great an augmentation to their resources; they vented their spleen by opening a brisk Cannonading the following Morning on our houses opposite, as well as the Military Waggons and passengers who were passing and repassing along the frontier.—This they had occasionally done for a week, without doing much damage. I am sorry however to inform you that three Lives¹⁴ were unhappily lost—one Individual who had taken shelter in Mr. Ussher's barn was so seriously wounded in the abdomen, that he died soon afterwards; another had his legs shot off; the third on undergoing amputation sunk with exhaustion.

The houses which contained Companys of Guards were battered severely; a ball went through the upper part of a room where 20 or 30 Men were stationed.—In the adjoining house, a Tavern, two Balls went through which induced the parties to decamp. A red hot ball fell near Captain Ussher which was afterwards preserved. In the house beyond, where I had been located for a Month—a ball entered the front door through the parlour and just took the corner of the Dining Table, forming a line on the surface as if ruled—went through Mrs. Ussher's bedroom and did considerable Damage.—Six others passed the House in different places, which ultimately rendered it untenable.—It was high time therefore to shift apartments below stairs into a Kitchen which was built behind an Embankment; here we were safe, but it was beyond a Joke the whizzing of the Balls, which at times came very near us.—You would have imagined that the people were here disciples of Charles the 12th of Sweden, had you seen the number of people congregated on the frontier, not only in waggons looking over to the Island, but on foot.—They were even imprudent Enough to stand in groups as a Mark for the rebels to fire at. I was one Morning walking with Mr. Meredith and Doctor

Hamilton in front of Mr. Ussher's house, when a warm firing Commenced—a ball passed behind us within 60 yards and tore up the ground; the whizzing Noise induced us to put our hands to our ears and I for one involuntarily lowered my head, upon which Dr. Hamilton coolly replied, it was better to walk on quietly upright; he however was used to such Matters in the last war.—Strange as it may appear, I believe now that it is possible even to be fond of the excitement, for Mr. Merritt's son who was up there one day, went away quite disappointed that he could not see them fire, and on those days when the Cannonading did take place, I have heard the bystanders exclaim "Go it ye Devils and take better aim."—There were many hair-breadth escapes and considering the immense number of times they fired, it is extraordinary so few fell a sacrifice.—A short time before the breaking out of the affray, we had built a foot bridge across the Creek at the back of Mr. Ussher's house. Captain Adams told me he was marching his Men across when a Ball struck in the Bank close beside them. I also saw one strike the water under the Bank when three officers were passing on Horseback.

Doubtless you will ask where the Balls were procured in so short a time for the use of the Ruffians, for I can call them No better.—Some they stole from the Arsenals, but the greater part were cast at a foundry in Buffalo.

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The Insurrection being quelled at Toronto and in the West, the Governor crossed the Lake to take a survey of the frontier. Landing at Niagara, he proceeded to Queenston and from thence to Chippewa, along the shore to Fort Erie, opposite Buffalo, the termination at that time of the guarded Coasts.—On his return, he was accompanied by Mr. Merritt and two other Gentlemen, who pointed out, as they rode along, every thing worthy of Notice on our own frontier, as well as the opposite shore and the Island where the rebels were encamped.—I was standing opposite Mr. Ussher's unconscious of their approach, when the Governor politely withdrew from his Company—shook hands and expressed his satisfaction at finding all along the line so vigilant and at their posts. I asked him when the Marauders would be dislodged, as they were a source of great annoyance to us by their frequent firing;—he replied that in a few days, on the arrival of the artillery, then on its way— it would be effected.—At this Intelligence from the fountain head, we were satisfied.—I have no doubt at the Time, this was fully contemplated, but on a Council of War being held, it was considered advisable if possible to spare the effusion of

human blood. On leaving Chippewa, however, he left orders with the Colonels in command to use their own discretion.

The Artillery at length arrived and a Number of Men were despatched up the river to raise embankments and breast work, preparatory to a general Bombardment. This was done at Night, the first set of Men being obliged to retire from their work in consequence of Cannon having fired to dislodge them, which was soon effected. None of the workmen received any Injury, but the works having first commenced in front of my friend's House, sad dilapidation ensued: the front wall fell in soon afterwards, which rendered the building quite unsafe and uninhabitable. At length the works were completed and our Mortars and Cannon being in readiness, a regular attack was contemplated, but so many schemes and plans were devised, that Nothing effectual took place after all. Three Schooners were manned and stationed up the river under the Command of Captain Graham, Lieutenant Drew and Lieutenant Elmsley—three Gentlemen of confirmed bravery—they were to cut off all Communication by water with Buffalo; then there were near 100 Boats of various sizes in readiness which, when manned, were to effect a landing at one End of the Island, whilst the Artillery were playing upon the Centre and Northern End; these however were quiescent, to try the effect first of all, of the Bombardment; when this commenced, the Bravados were alarmed not a little. The 24 pounders and Mortars raked the Trees and the Shanties—tore up the ground and Killed some of the Rebels: but main body still clung to the Island. Had the Boats been ready Manned, a landing might with ease have been effected during their panic: this scheme was however overruled—so much for a multiplicity of Councillors, in which we are told safety Consists. The prolongation of storming the Island had a bad effect, inasmuch as the alarm was unabated; it also drove many peaceable families from their homes and domestic firesides at an inclement Season of the year. I never could comprehend the policy of their operations, further than what I stated before—the desire to prevent the dreadful Massacre that must have ensued for very few I apprehend would have escaped, so Indignant were the people on this memorable occasion.

That you may judge the situation of the contending parties, I hand you a small Map of our positions, sufficient to guide your Ideas to the spot, remarkable in history. There lay entrenched a handful of desperate fellows who Kept a whole Country in agitation for upwards of a Month, and we residing within Cannon shot, liable at a Moment's impulse to have a ball sent through the House or perhaps a leg shot off whilst perambulating the Banks of the River.

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From the time of their arrival there on the 13 December to the period of their Evacuation on the 15 January, you may be sure such restless adventurers were not idle in concocting mischief—fortunately however thro' the fickleness of their plans and their constant differences and quarrels, no measures were effected for our annoyance further than what I mentioned relative to their occasional Cannon Exercise and rifle shooting:—It was imagined however, that one Night, they were ripe for some expedition, and in order to give signals and divert us from their Movements—they lighted up a Machine which was moved to and fro on the Island.—From it issued a most dazzling and brilliant light, which could be seen for many miles around. It was supposed to consist of Tar Barrels and other Inflammable Materials, which burnt for several hours.—No movement however took place.—They had schemes to divert our attention in various ways, which were afterwards acknowledged.

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. Their general Correspondence, which was freely carried on by Spies, notwithstanding our vigilance. They knew all our movements, although we could gather nothing of their's from their peculiar locality on an Island.

Nearly a day elapsed before we knew of their departure and great conjecture arose as to their point of destination. In the course of the day one solitary Individual was seen waving a flag but this was looked upon with suspicion—In the afternoon authentic Intelligence arrived of the Event, yet, very many even then were incredulous, altho from the circumstance of seeing none on guard as usual it was apparent some Movement had taken place.—To settle the question, a party volunteered to go over; it was considered a hazardous undertaking, more especially as many surmised that they had excavated subterraneous caverns to Enter, and knowing the schemes they planned to deceive us it was no wonder a source of anxiety to learn the result. At the time, the Information of very few could be relied on, as so many strange rumours were afloat and so many spies over here awaiting our Movements and spreading reports to mislead us.—A great number assembled on the shore as you may imagine to know the result, and many anxious hearts were relieved when a general huzza proclaimed that the Island was once more in our possession and the British flag flying.

Their movements had been so rapid to clear out, as they termed it, that one poor wretch was left behind,¹⁵ who was glad enough to hail his rescuers, from the thralldom he had so long entrammelled in—

he stated that he was asleep, and knew nothing of their movements: on his examination but little could be elicited from him, further, than that he had been a hewer of wood and drawer of water and was heartily glad that the expedition was abandoned—he was soon released from Captivity, having been taught a lesson for his folly that he will not easily forget.

Had it been Brobdignag Island, greater Curiosity could not have been evinced to see it:—An old Shoe or a slip of Cloth were as great curiosities as some of the relics they shew you in France: grape Shot—pieces of punched Iron from Steam Boilers, furnished from Black rock foundry were as precious as current Coin; and as to Pikes, they were trophies of too intrinsic value to fall to the lot of many; they decorated Halls and curious Cupboards, whilst half a Bombshell or a Cannon Ball embellished a lady's work Table.—The few of the rebels who wore shirts carried them away, filthy as they were on their backs as scarce a vestige of linen was found with the exception of part of the tail of a shirt that had bound up a wounded Leg. Nothing can exceed the Miserable Condition of a Buccaneer's Life, far worse than that of savages, for they know no better.

The number who were killed or wounded, by our bombardment was never ascertained,¹⁶ as their burying place was on Grand Island, where they occupied a Log-hut as Hospital—one newly made grave was found, which on digging the Earth away, was found to contain the body of a poor wretch who was supposed to have been shot by their own party, as he was lying with his arms pinioned; who this Individual was has never been ascertained.¹⁷

The miserable state of existence they must have endured, baffles all description. It is almost impossible to convey to you the disgusting scene which was exhibited. The Shanties wherein the Miserable wretches bivouacked were scarce fit receptacles for pigs, being strewed with beans, peas, pork rhine, vermin and dirt. Their beds were composed of brushwood, and nothing to shelter them from the Inclemency of the Weather but pine branches. Here they congregated at night, eating, drinking, smoking, swearing and sleeping. For an occasional bivouac on a deer hunting expedition, such a logement would pass Current but for fifty or sixty human beings to assemble nightly for one Month together, betokens a race of desperados worse than Savages.

Mrs. Mackenzie was over there part of the Time¹⁸ living in a dirty house at the back of the Island which I before described to you. The only accommodation for her at Night was on a shelf covered with straw.

NOTES

In the following notes, contractions will be employed as follows:

"Dent." The story of the Upper Canadian Rebellion by John Charles Dent, Toronto, 1885. This work is more than usually accurate in the account of the "Caroline" episode. I have not referred to "The Cutting out of the 'Caroline' and other Reminiscences of 1837-38" by Robert Stuart Woods, Q.C., (afterwards Judge Woods), Chatham, Ont., 1885—everything of value in that work has been utilized by Dent.

"Head." A Narrative by Sir Francis B. Head, Bart. 2nd Edn., London, 1839. I have not quoted Head's "Emigrant"—it does not afford any useful material.

"Leg. Ass." Journal of the House of Assembly, Upper Canada, Session 1837-8, Toronto, 1838 (Official).

"G. T. D." The Burning of the "Caroline," by G. T. D. (George Taylor Denison, Sr., father of the Police Magistrate of Toronto, of the same name). The Canadian Monthly and National Review, Vol. 3, 289 (April 1873). The head note reads "The following narrative is by a Canadian officer who served against the rebels and their American sympathisers." It does not appear that Denison took part in the cutting out.

"Trial." Gould's Stenographic Reporter, Vol. II, Washington, D.C., 1841. This contains a full stenographic account of the trial at Utica, N.Y., October, 1841, of Alexander McLeod, charged with the murder of Amos Durfee at Schlosser, at the cutting out of the "Caroline." It was satisfactorily proved that McLeod was not in the expedition at all, although both he and his friends had claimed that he was.

"Kingsford." The History of Canada, by William Kingsford, LL.D., F.R.S. Can., Toronto, and London, 1898, Vol. X.

"Lindsey." The Life and Times of Wm. Lyon Mackenzie, by Charles Lindsey, two volumes, Toronto, 1862.

¹ Probably Col. Kenneth Cameron, formerly of the 79th Highlanders and at that time Assistant Adjutant General.

² Possession was taken by the "Patriots" of Navy Island, December 13th, 1837.

³ Colonel (afterwards Sir) Allan Napier MacNab arrived at Chippewa, December 20th. His name is found spelled in many ways: McNab, McNabb, M'Nab, M'Nabb, Macnab, Macnabb. He was placed in command on this frontier and was afterwards knighted for his services.

⁴ Lieutenant Governor Francis Bond Head as early as December 13th, 1837, had sent a remonstrance to Governor Marcy, of the State of New York, concerning the agitation at Buffalo to procure countenance and support for the disaffected in Upper Canada. Head, 332; Leg. Ass., 97—the Governor, December 19, issued a Proclamation against attempts to set on foot military expeditions or enterprises in violation of the laws of the land, and the relations of amity between the United States and the United Kingdom, Leg. Ass., 98—this was almost a dead letter and practically nothing was done for weeks to check the movement. On Navy Island being occupied, Head, December 23, sent Archibald McLean, Speaker of the House, to Washington with a full account for the British Ambassador, Henry S. Fox. Head, 335; Leg. Ass., 98.

⁵ I have not seen this "experiment" of the Magistrates noted by any other writer.

⁶ Richard Arnold's account is as follows (Dent, Vol. 2, p. 215):

"The next day (*i.e.* December 26, 1837) I and several other volunteers accompanied Captain Drew on a reconnoitering expedition. We set out from Chippewa Creek in a small boat and proceeded to circumnavigate Navy Island, where we

could see the rebels in full force. As we approached the island they fired round after round at us, and the bullets whistled thick and fast over our heads. Our position was one of extreme peril. 'What a fool I am,' exclaimed Captain Drew, 'to be here without a pick-up boat. Should we be disabled we shall find ourselves in a tight place.' One of the rowers in our boat was completely overcome by fear, and faked. 'I can't help it boys,' said he—and threw himself at full length along the bottom of the boat. We made the trip, however, without any accident. The next day we made another expedition in a large twelve-oared gig, with a picked crew, chiefly composed of lake sailors. Again the shots whistled over our heads, and struck the water on both sides of us, but in the course of a few hours we found ourselves back again in Chippewa Creek without having sustained any injury. We had by this time become used to being under fire, and didn't seem to mind the sound of the whistling bullets."

⁷ This was the "Caroline," a steamboat about 75 feet long and of 46 tons burthen, the property of William Wells of Buffalo, which was cut out of her berth in the ice at Buffalo and brought down to Schlosser, December 28th, plying across to Navy Island.

⁸ Captain Drew, R.N., who was in command of the expedition, in his report, December 30th, says: "I directed five boats to be armed and manned with forty-five volunteers." Leg. Ass., 90. G. T. D. says: "Five boats were prepared, well manned, well armed and with muffled oars." Can. Monthly, Vol. 3, 290. Richard Arnold says: "The expedition consisted as far as I can remember of seven boats, each containing seven men, *i.e.* four rowers and three sitters." Dent, Vol. 2, 216. The number of boats is given as seven by most authors and is probably correct. Sir Allan MacNab, under oath in the McLeod trial, says: "they were seven in number . . . seven or eight men in each boat . . . about forty persons." Trial, 124. "The boats did not all return at the same time. Five arrived at about the same time, two at a different time." Trial, 125. John Harris gave the same evidence. Trial, 129. "Seven boats left Chippewa, five only reached the Caroline, five returned in company." With this Edward Zealand agrees word for word, Trial, 135. Robert Armour says: "Seven started, five crossed the river," Trial, 147; so do Christopher Bier, Trial 157, 159, Hamilton Robert O'Reilly, Trial, 162, 165, Sheppard McCormick Trial, 169, Frederick Claverly, Trial, 170, 175, and several others. The fact seems to be that seven boats started but two lost the way and did not cross the river.

⁹ This should be "29th."

¹⁰ It seems quite certain that the "Caroline" did not go over the Canadian Falls, nor as a whole (at least) over the Falls at all. Her engines seem to have sunk and portions of her charred wood work went down the river and over the Falls on the American side.

¹¹ Both British subjects—one was Sylvanus Fearn Wrigley, of the Township of Dumfries, who had enlisted with Dr. Duncombe; after Duncombe's men were dispersed, he crossed the Niagara River to join the "Patriots." He was on his way to Navy Island where he was captured. He was detained in gaol for three months and then discharged on giving bail for good behaviour. The other was Alfred Luce, a native of Lower Canada, who had also joined Dr. Duncombe; he shared in Wrigley's adventures until his capture. He was released the following day and sent across the ferry to the United States, as there seemed to be doubt whether he was not a citizen of that country. Dent, Vol. 2, 213; Leg. Ass., 91.

¹² Lieutenant Shepherd McCormack (so named by Drew in his official report, December 30, 1837, Leg. Ass., 90—but both his names are spelt in different ways, *e.g.* the pensioning Statute, 1838, 1 Vic. c. 46, calls him Sheppard McCormick)

was shot in several parts of his body and also received two cuts from a cutlass. He was permanently injured; he received a pension from Upper Canada of £100 (\$400) per annum, counting from December 29, 1837. The Preamble of the Act is worth copying:

"Whereas Sheppard McCormick, Esquire, a retired Lieutenant in the Royal Navy, received several severe wounds in action at the capture and destruction of the piratical steamer 'Caroline,' in an attempt to invade this Province by a lawless banditti, by which he is disabled and it is just and right that he should receive a Pension during such period as he may be so disabled by said wounds."

He received the pension until his death when it was continued to his widow.

It was the conventional thing for all loyal Canadians from the Lieutenant Governor down to call the Canadian Rebels and their American "Sympathisers," "*Pirates*"—they were "*Pirates*" to precisely the same extent and in the same way as William of Orange and his English and Dutch followers—"Pirates," however, offset "*Patriots*" with "apt alteration's artful aid." "*Banditti*" ("we call them plain thieves in England") is another term of opprobrium equally well deserved: "a *Banditti*" is not quite without precedent in our literature—but then I recall a student of mine, *Consule Planco*, speaking of the distance between "one foci of an ellipse and the other." And Parliament is like Rex, *super grammaticam*.

The second reported wounded was Captain John Warren, formerly an officer in the 60th Regiment—his wounds were trifling and he resumed duty the following day, *Dent*, Vol. 2, 212; *Leg. Ass.*, 89, 90. The third was Richard Arnold (wrongly called John Arnold in the official report, *Leg. Ass.*, 90). His story is given in *Dent*, Vol. 2, 214—he was "struck by a cutlass on the arm and got a pretty deep gash just above the elbow;" he was "invalided and sent home to Toronto in a sleigh next day;" "there his wound healed rapidly, leaving him none the worse." He died in Toronto, June 18, 1884. He always was properly proud of being the last man to leave the "Caroline."

¹³ Captain Drew in his official report said, "I regret to add that five or six of the enemy were killed," *Leg. Ass.*, 90; but it is reasonably certain that there was only one killed—this was Amos Durfee of Buffalo, for the murder of whom Alexander McLeod was tried at Utica, N.Y., in 1841. There were several wounded, more or less severely.

¹⁴ MacNab, writing to Lt.-Col. Strachan, from Chippewa, January 19, 1838, says, "Three of our brave and loyal Militia have unfortunately lost their lives in the service of their country against the Rebels and their piratical allies upon Navy Island. They were all killed by gunshot wounds." *Leg. Ass.*, 264.

¹⁵ He was arrested as a spy but released.

¹⁶ The existing accounts mention that the casualties on the Island were one killed by a round shot, and one slightly wounded by a splinter. *Dent*, Vol. 2, 224, note.

¹⁷ I have not seen any reference to this circumstance in any of the other accounts.

¹⁸ Mrs. Mackenzie, née Isabel Baxter, a native of Dundee, was married to William Lyon Mackenzie at Montreal, 1822, when Mackenzie was living in Dundas. She was a woman of sterling character, a devoted wife and mother. She was the only woman who spent any time on Navy Island. "She arrived there only a few hours before the destruction of the 'Caroline,' and remained nearly a fortnight with her husband, making flannel cartridge bags and inspiring with courage by her entire freedom from fear, all with whom she conversed. At the end of about a fortnight, illhealth obliged her to leave." Lindsey, Vol. 1., 38, Vol. 2., 163.

Navy Island was abandoned by the "*Patriots*," January 14th, 1838, *Dent*, Vol. 2, 223.

Humours of the Times of Robert Gourlay

By WILLIAM RENWICK RIDDELL, LL.D., F.R.S.C., Can.

(Read May Meeting, 1920)

Robert Fleming Gourlay the Neptunian and Banished Briton was a man thoroughly in earnest; his high sense of public duty, his devotion to the cause of the poor, his absolute truthfulness, his perseverance in the path of what he considered right all recommend him to serious respect while his shameful treatment at the hands of the authorities of Upper Canada a century ago, his unmerited sufferings, his spirited if misguided conduct throughout the disgraceful prosecution move our sympathy and ensure our regard. We forget his self centredness, his egotism, his jealousy of anyone else occupying the stage and receiving the attention of the country, his unreason and wrong headedness in his search for justification. So much so that there has grown up a Gourlay myth—he is the father of Responsible Government who publicly cried "Responsible Government; what has that effected? An unblushing waste of public money and a monstrous debt.—"¹ the forerunner of William Lyon Mackenzie and the protagonist of political reform—he who despised Mackenzie and lampooned him as a monkey, who dubbed him the "self styled Patriot Hero of Navy Island and Prince of Mischief makers"² and who had no thought of reform anywhere but in the economic field³.

Serious as he was, seriously as he was considered by the authorities of the Province, serious as were his wrongs and his sufferings, his career was not without its humorous accompaniments and these or some of them it is the object of this paper to state.

Born in the ancient "Kingdom of Fife" and with more than usual perversity⁴, he left his native land after a quarrel with the Earl of Kellie over what he took it into his head to consider a deadly insult, which, when investigated boils down to the simple fact that the Earl being in the chair of a public meeting adjourned the meeting when Gourlay was speaking—whereupon Gourlay wrote and circulated a vicious pamphlet against him.⁵ He went to England and rented a farm from the Duke of Somerset; he got into a mass of litigation with his landlord to compel him to give him a lease which Gourlay had himself refused to sign when offered to him. While he won some of his litigation he was deprived of costs because before the Lord Chancellor he jeered at the Duchess as wearing the breeches.⁶

Then he came to Canada; intending to return in six months,⁷ he was bitten by mosquitos so badly that he was laid up two months and so prevented from returning.⁸ Thus he was detained in Upper Canada to become a storm centre for two years.

His early Addresses to the people of the Province were, *bonâ fide*, to obtain economic information, but the foolish opposition of the official set forced him into politics. It is not proposed to go into his campaign efforts here; the story can be read in his several writings.⁹ Only certain matters which have elements of humour will be referred to.

Travelling in the eastern part of the Province holding public meetings in support of his schemes, he passed through Brockville "outwardly a delightful place, and when it contains as much honesty as pettifogging law will be truly enviable"¹⁰, at Johnstown a Justice of the Peace, Duncan Fraser by name, made a violent and unprovoked assault upon him; pleading guilty of the assault the Magistrate was fined 40 shillings (\$8) while one Grant, a by-stander, who had tried to keep the peace, but struck back when Fraser struck him was fined £5 (\$20) and imprisoned for one month!!¹¹ At Kingston he got into controversy with Christopher Alexander Hagerman, a lawyer of note, and afterwards Attorney General and Justice of the Court of King's Bench. Hagerman said Gourlay "must have a Dolt's head," a friend of Gourlay's replied referring to Hagerman's "false, foolish and impertinent letter," and Gourlay thinking honours were easy let the matter drop for a time—he was right, however, and the lawyer was wrong in the law¹². But he soon published a statement that Hagerman's brother was a felon and had been hanged, excusing himself afterwards by the grotesque explanation "that he had reason to thank me for openly declaring what was said of him that he might at once put an end to the story . . . by making his appearance." Hagerman horsewhipped him, and a magistrate put an end to the affray¹³. The original recognizance requiring of Hagerman to keep the peace for a week is now at the Canadian Archives at Ottawa.¹⁴

Returning to York, Toronto, he in July, 1818, attended a meeting of the "Friends of Enquiry," *i.e.*, those who supported his scheme of petitioning the Prince Regent (the Home Government) to enquire into the affairs of the Province. The proceedings of the "Convention" (as it was unfortunately called) are duly recorded by Gourlay.¹⁵ and they are serious enough. But there happened to be in York shortly after the time a "well known character" from Kingston, Amos Ansley, "Yeoman Ansley," living on Lot No. 12 in the First Concession of the Township of Kingston; he was a chronic "kicker," rather more than

eccentric. We find him complaining to William Dummer Powell, "Chief Justice in the Province of Upper Canada," of Thomas Markland not putting in their proper place the monuments marking the limits of the lots in that Township "to the Great Damage of the Inhabitants and the Total Subversion of the King's Peace"—worse than that, "he sanctioned the Act of a Rebellious Mob who had laid Violent hands on the Body of Amos Ansley, the said Ansley Being in the Peace of God and the King alone, and in Quiet on the Kings Highway in 1812 and Committed him to Prison without an oath and without a Trial. No eye to pity No Hand to Save."

The Judge not granting relief, Ansley had applied to the Church and wrote to "the Reverend George Okil Stuart" in the name of God requiring him to admonish Thomas Markland to order Mr. James Nicol to set the monuments so as to "protect His Majesty's Subjects in the Land that was allotted to them when this Country was a howling wilderness," and if Ansley is not settled with "when the Grand Jury is sworn it will Be to Late—there Has Been as Great Men as Him Indicted for f. and H.T."¹⁶

Notwithstanding the adjuration, "Remove not the ancient Land Marks which they fathers Have Set Proverbs cXX v 20 Deuteronomy XIX, 15, 16, 17, 18, 19, 20, 21, c XXXII, 17"—the appeal to the clergyman seems to have been unsuccessful. Thereupon Ansley sent it to Sir Peregrine Maitland, "Governour," for the attention of His Majesty's Attorney General. As he endorsed the words "Sleepy and Lazy Priests that Nither Serve God Nor the King," it is not wholly astonishing that the Attorney General endorsed the paper "From Amos Ansley Transmitting some very ridiculous papers."

Some wag seeing Ansley in York wrote and printed a travesty of the proceedings of the Convention and a copy was handed to Ansley by Ezekiel Benson at York, July 22, 1818. This "skit" endorsed by Ansley, "We Never Ware Rebels and we Never will Be"—"This is a Liebill published in the Town of York for which the Yorkers shall Be Indicted for publishing the said Scandalous Libill," was also sent in to the Governor for the Attorney General. And when one reads it, one cannot think that Ansley is too emphatic when he calls it a Libill.

It reads thus:—¹⁷

"At a Meeting of the Representatives from the different Townships, assembled in General Convention, for the redressing of all public grievances in the Province, held at York, at Mr. Forest's Hotel, on Monday, the 6th of July, 1818:

PRESENT,

Robert Gourlay, Lewis Ketchum, John Clap, George Hamilton, William Brushum, Peter Hogboom, John Wright, Abel P. Forward, Robert Hamilton, Henry Segar, David Damwood, Benoni Wells, Adam Dills, Daniel Washburn, George Yocum, William Kerr, John Rose, John Clark, John Dickhout, Hugh C. Thompson, Peter Snitzer, Lieut. Col. Richard Beasley.

RESOLVED, that the thanks of this assembly are due to Mr. Gourlay for all he has done and suffered in the great cause; for the industry with which he has circulated his calumnies, and the patience with which he has borne chastisement for them,

RESOLVED, that for the perfect security of the public money, collected for the defraying the expences of the Commissioners to and from England, it be placed in the hands of our right trusty friend Barnabas Bidwell, Esquire; who shall proceed with the Commissioners as their travelling Treasurer. And it is farther resolved that the said Barnabas Bidwell be particularly advised, for certain reasons, not to proceed with it to England through the United States.

RESOLVED, that Mr. Amos Ansley, as the most respectable in appearance of our body, be selected to present the petition to his Royal Highness the Prince Regent, at the foot of the Throne. And that before the said Amos Ansley proceed on his mission, a commission of Lunacy be appointed, to enquire whether there are any immediate symptoms of approaching madness.

RESOLVED, that Mr. Robert Hamilton, Mr. John Clap, Mr. William Kerr, Mr. Peter Hogboom, Mr. John Clark, Mr. George Yocum, and Mr. George Hamilton son of the late Hon. Robert Hamilton, be a committee to accompany the said Amos Ansley, and that they be particularly careful for the credit of the Representatives, that the said Amos Ansley do not run naked about the streets of London, blowing horns or trumpets, as he has been occasionally wont to do.

RESOLVED, that the Convention being rather short of grievances, will defer sending home their Petition, for two months, during which time, any person who will furnish them with any general grievance, or with any particular lie against any person in office (or otherwise respectable,) sufficiently scandalous to be unanimously adopted by the representatives, shall be paid Twenty Dollars out of the Public Fund, so long as it lasts; and if the said particular lie shall concern the Reverend Dr. Strachan, they shall be paid five dollars additional—or any of his pupils, two dollars and a half.

RESOLVED, that Mr. Gourlay shall be at liberty to make up a contingent account for plasters and bandages, and shall be allowed

3s, 6d. for every kicking, and 5s for every horsewhipping: and it is further Resolved, that an Address of condolence be presented to our loyal and patriotic captain George Hamilton, for the additional loss recently sustained in the wreck of his curricule, on the road between Belleville and little York, from want of his horses having the accomplishment he so elegantly recommends "of giving a long pull, a strong pull and a pull both together" which deprived this committee of the benefit of his transcendant abilities, and himself the opportunity of displaying his dignified oratory.

RESOLVED, that it is proved to the satisfaction of this meeting, by the evidence of Mr. Gourlay, and by inspection of his person, that the inhabitants of the Midland, Johnstown and Eastern Districts, are violent friends to their King, Country and Constitution, and therefore deserve the marked disrespect of every well wisher of our great cause.

RESOLVED that it is a grievance that our streets are not paved—that we have no city as large as New-York—that all our English and Scotchmen are not Yankees—and that Canada is not somewhere in the Genesee country.

RESOLVED, that little York is a great nuisance.

RESOLVED, that it is a grievance that all the people of the lower Districts have not more money and less wit.

RESOLVED, that it is a grievance that the government is administered in the manner it is—upon which it was moved in amendment by Mr. Gourlay and voted by acclamation as the unanimous sense of the Representatives, that it is a much greater grievance, that there is any government at all.

RESOLVED, that it is the opinion of this meeting, that the Attorney General has been guilty of gross dereliction of duty, and brought down upon himself the odium and contempt of the most respectable body of the community, and particularly of the members comprizing this convention, in assuming the power of proceeding ex officio against the first and only champion of Democracy, Liberty and Equality, that has appeared since the time of our much lamented friends, WILCOX, MALLORY and MARACLE.

RESOLVED, that it is a grievance, that there are no more grievances.

RESOLVED, that for the redress of all these grievances, and particularly of the last, His Royal Highness be specially requested by Amos Ansley to appoint him Lieutenant-Governor, Mr. Barnabas Bidwell Receiver-General, Mr. Casey Chief-Justice, Mr. Washburn Attorney-General, Mr. Patrick Strange Secretary of the Province,

Mr. James Durant Inspector of Public Accounts, and Mr. Gourlay Superintendent-General of all Departments, with a general exemption from all prosecutions for all felonies, treasons, libels and seditions.

RESOLVED that the Rev. Dr. Stachan be commanded to desist from instilling into the minds of the Youth of this Province the pernicious principles of loyalty and attachment to the Constitution, and that Mr. Amos Ansley, Mr. Hamilton and Mr. Kerr be directed to afford such encouragement as their friends will warrant, to Mr. Hone, to return with them to this Province to bring up our Children in the way of piety and virtue.

That Amos Ansley make it a point with His Royal Highness the Prince Regent that little York shall be blown to atoms—that Major Simons' half pay shall be struck off and transferred to Captain William Kerr as a matter of Justice—that Mr. Gourlay's letters from his dear wife be forwarded by a Special Messenger once a week, and that henceforth to preserve purity of morals and decency, order and decorum throughout the Province, Mr. Robt. Gourlay have absolute control over the Press, that nobody's lies, and scurrility may be published but his own, or that of his intimate friends."

The Meeting then adjourned to Tuesday.

Endorsed by Ansley.

"Received this from the Hands of Ezekel Benson at York, U.C., this 22d day of Feby. 1818.

AMOS ANSLEY.

We Never were Rebels and Never will Be.

We wish to reap the frutes of Our Labour and keep the King's peace.

AMOS ANSLEY.

Kingston,

August the 2d 1818

Let us pass over a score of years—Gourlay had been banished, had gone to the old Land, deluged King and Parliament with Petitions, horsewhipped Henry Brougham in the Lobby of the House of Commons, remained in prison at Cold Bath Fields for many months because on principle he would not give bail or allow his friends to bail him, worked on the road as a pauper where he had been a prosperous farmer, contemplated suicide but compromised by some more petitions, returned to this Continent the Neptunian and Banished Briton, repudiated Mackenzie and all his works, and came to Upper Canada in 1838 to see Lord Durham, then on his mission of enquiry and conciliation. Failing to see Lord Durham he consoled himself by writing a lampoon on him.

"A brief but sufficient and very faithful history of the Durham Administration—written a few days after receiving the above trifling letter from Couper,¹⁸ October, 1838,"

A Durham Ox came o'er the sea
And landed at Quebec;
Canadians all were on their knee
And instant at his beck.

The Durham Ox moved up the burn
To see the muckle Falls.
The Buffaloes, on Erie's bank,
Thought he was come to balls.*

They asked if he would feed with them
And said their grass was good;
But the Durham Ox turned round his tail
And down the burn he stood.

The Durham Ox, now tethered fast
Upon Victoria's lea,
Bade Yankees come from every town
His mightiness to see.

The Durham Ox looked smooth and sleek
The Yankees, they seemed wondrous meek,
But yet were very pawkie
And after all the shows he made
They thought him but a gawkie.

And now the truth is wholly out;
Nor need we any longer doubt
So all the world may fairly laugh,
To think the Ox was but a Calf.

*It will be remembered that Lord Durham gave a ball to the gentry of Buffalo and they in turn expected him at a civic feast (Gourlay's note).

Perhaps Durham never saw this effusion and if he did he probably despised it.

The next year Gourlay thought "the church itself wholly militant. Episcopalians maintaining what can never be established. Presbyterians more sour than ever contending for right where they have none whatever.¹⁹ Methodists so disunited that they cannot even join in a respectable groan and Catholic Priests wandering about in poverty because their scattered and starving flocks yield not sufficient wool for the shears": and when he came to the Legislature in Toronto and when the Members of the House of Assembly refused to hear him at their Bar, he sought comfort by breaking out into verse again:²⁰—

A monkey once sprung up aloft
And gibbered in the trees:
The bears and wolves began to dance
And bum went all the bees.

A shot or two being fired at Pug
Away the creature scampered
And truly it made unco speed,
With bulk being little hampered.

Arrived at Jonathan's outpost
And perched up in the playhouse
A farce began which, right to scan
No man could say it was douce

Douce, did I say?—hoot man away;
'T was really sad and sadder
For men to Buffaloes were turned
And they grew mad and madder.

They gored the ground; they cocked their tails;
They flung up the dust; they trod down rails
And nothing could withstand them;
Till great Van Rensselaer stepped forth
And said he would command them.

To Navy Island quick they marched,
And quick were in possession.
Quick ran the news across the land
To Parliament in session.

Sir Francis said "My dear McNab,
Rise from the chair, mount any cab,
And rouse the men of Gore;
Now I'm awake, good care to take
That no one else shall snore.

When I sprung out of Römney March
Just like a little spunkie
I never dreamt of aught so harsh,
As fighting with a monkey.

But since it is my knightship's fate,
Do you go forth and thunder,
That you may rise, in royal eyes,
And then, we ne'er shall sunder.

Sir Francis, I—Sir Allan you—
The Yankees we will humble
And this cursed ugly monkey now
Out o'er the Falls we'll tumble."

Britannia's flag you now may see,
 From Drummond's Hill to Fort Erie
 While thousands range around;
 With shot and sheel the trees they fell
 And make a mighty sound.

—Fifean.

Edinburgh Castle, May 6, 1839.

A similar want of success in 1840 drove Gourlay again to rhyme—he already drank as became his time and country—*nascetur ridiculus mus*²¹

Good lauk, what next!—a boat unfixed—
 The little Caroline
 Cut from the ice; and all so nice
 Now on the lake doth shine.

A spec!—a spec!—a glorious spec!
 The Buffaloes roar out,
 Victoria's wealth is all our own,
 And Canada no doubt.

We'll moor the boat—we'll store the boat,
 With "*articles of freight*"
 And when our flag is hauled aloft
 We'll swear the whole is right.

For trade is free to all the free,
 And we're the sons of freedom,
 We'll freedom take, there's no mistake
 Nor need we longer dread 'em.

Ah, Jonathan! Ah, Jonathan!
 Thou art a boastful loon;
 But there's a God above, I trow
 Will make you change your tune.

Snug in your port, you deem it sport
 To laugh at human woe;
 But God above will you reprove
 And that you soon shall know.

It matters not what are His means,
 Or what you call the deed.
 The whole is rightly ordered, man,
 Your wickedness to feed.

To make you stamp, to make you swear,
 To show you off a good long year,
 That all the world may know—
 Till human nature better is
 You have no right to crow.

Look back to Malden and Pelé,
The Short Hills interlude;
Look back to Prescott's bloody field,
And Windsor, still more rude.

All villainous—most villainous!
Not one redeeming act,
Historians cannot better it.
Nor e'er dispute the fact.

But when we think upon the thing
That led you on to war;
A monkey vile chock full of bile,
It beats the Globe by far.

The monkey first made you to thirst,
For acres and for dollars;
And now in cage, it spends its rage
On Uncle Sam's tight collars.

Robert F. Gourlay.

Edinburgh Castle, Feb. 5, 1840.

NOTES

MEMO:—In these notes the contraction

"Gour" is used for my work "Robert (Fleming) Gourlay as shewn by his own Records," Ont. Hist. Soc., Toronto, 1916.

"Nep." "The Banished Briton and Neptunian," No. 1, or "The Neptunian," Nos. 2-39.

¹ "Mr. Gourlay's Case/ Before the/ Legislature/ with His/ Speech/ Delivered on Wednesday, July 1, 1858/ In Two Parts/ Toronto/ Printed at the Globe Book and Job Office /1858."

This 8vo pamphlet of 29 pages contains Gourlay's speech before the Legislative Assembly of Canada, July 1, 1858, in his own behalf—a real *Apologia Vitae* which he was permitted after much opposition to make, something he had been long striving for—it is rather a poor performance evidencing "either complete loss of control of himself or a marked weakness, bodily or mental." See Gour., pp.112, 126.

² Gour. 83, 91. 122: Nep. No. 2, 6; No. 7, 72.

³ Gour. 17.

⁴ I have often heard Scotsmen—generally of other parts of Scotland, be it said—assert "a' Fifehire folk are a bit cracked": my own experience has been that they are more than usually astute, perhaps "pawkie" is a better word.

⁵ Gour. 8, 55, 56.

⁶ Gour. 10, 56; 83; *Gourlay v. Duke of Somerset* (1812) 1 Vesey & Beames' Chancery Reports, p. 68.

⁷ Gour. 14, 56; Nep. No. 1, p. 15; No. 17, p. 180.

⁸ Gour. 15, 57; Nep. No. 25, p. 305, n. 6, p. 308 n.; Nep. No. 22, p. 238 n.

The critics—*mali homines*—will no longer allow us to read the "Culex" as Vergil's: and the "cana culex" of Plautus they say is an old rascal of a lover; but one feels like saying "eho tu . . . cantrix culex" to our native songstress.

⁹ My life, "Gour" gives an abstract of most of these—those interested are referred to that volume for a full account of Gourlay's extraordinary life.

¹⁰ Gour. 27.

¹¹ Gour. 28, 29.

¹² Gour. 29, 59.

¹³ Gour. 29.

¹⁴ Canadian Archives, Sundries, U.C. 1818.

¹⁵ Nep. No. 30, p. 427; "Chronicles of Canada, 1818," pp. 17-20. See note 17 (infra).

¹⁶ Of course "Felony and High Treason," a phrase in very wide use in those days against all who expressed their discontent against the Government, however mildly.

¹⁷ The fact that the meeting was called a "Convention" was used by the Government party to compare it to the "Conventions" of the French Revolutions and so to discredit it as being republican and anti-British. I give an abstract of the meetings taken from "Chronicles of Canada, 1818," pp. 17-20.

Meetings of the Upper Canadian Convention of Friends to Inquiry, York, Monday, July 6, 1818.

For the

District of Niagara

Present.

Robert Hamilton, Esq.

John Clark, Esq. J. P.

Dr. Cyrus Sumner

(Major William Robertson reported absent from sickness)

| | | |
|-----------------------|---|-----------------------------|
| District of Gore | } | Richard Beasley, Esq. J. P. |
| | | Mr. William Chisholm. |
| London District | | Mr. Calvin Martin. |
| Western do | | Mr. Roderick Drake. |
| Midland District | } | Daniel Washburn, Esq. |
| | | Mr. Davis Hawley. |
| | | Mr. Paul Peterson. |
| | | Mr. Thomas Coleman, Esq. |
| District of Newcastle | | Mr. Robert J. Kerr. |
| Johnstown District | | Mr. Nathan Hicok |
| Ottawa do | | |
| Home do | | |

(Gourlay addressed the Convention at their request but was not a member.)

Richard Beasley J.P. in the Chair.

William J. Kerr Secretary and

Daniel Washburn Assistant Secretary.

Board of Management met at Ancaster, July 21, 1818; and drew up a Petition to the Prince Regent.

Present Richard Beasley,
William Kerr,
William Chisholm,
John Clark,
George Hamilton
and Roderick Drake.

The Board of "Permanent Committee" met again at St. Catharines, August 1, 1818; had the Petition engrossed, signed and ordered to be transmitted to England.

Present Richard Beasley,
George Hamilton
Roderick Drake
William Kerr
and John Clark.

It will be seen that the eastern part of the Province which had been canvassed by Gourlay himself was poorly represented.

Some of the persons named in the parody may be more particularly referred to here.

Barnabas Bidwell, the father of the more celebrated Marshall Spring Bidwell, had been guilty of defalcations as Treasurer of the County of Berkshire in Massachusetts—hence the suggestion that he should be Treasurer and keep out of the United States on his way to England.

George Hamilton was the founder of the present City of Hamilton; I do not know the occasion of the wreck of his curricule.

The antics of Amos Ainsley were notorious but I cannot find that he actually ran naked at any time.

Gourlay had been entrusted in May, 1818, by the Niagara Committee to look after the Midland, Johnstown, Eastern and Ottawa Districts—he had little success and by the time he reached Cobourg on his way west he was clearly in bad odour. Gour. pp. 26 sqq.

The Attorney General was John Beverley Robinson, who, apparently indifferent at first to Gourlay and his movement, soon became satisfied that he was a dangerous demagogue. It seems reasonably certain that he was influenced by the Reverend Dr. Strachan, whom Gourlay attacked without mercy and whom he affected to despise. The Information *ex officio* referred to is one of the most discreditable proceedings of the time. Gourlay's Address headed "Gagg'd-Gagg'd by Jingo" was published in the *Niagara Spectator*, December 3, 1817: Isaac Swayze laid an information against Bartimus Ferguson, the editor of the paper, and Ferguson was arrested and placed in Niagara Gaol. But this prosecution dropped and he was released. June 28, 1818, Gourlay sent another article to the *Niagara Spectator* which published it—it is said in the absence of the editor; the article attacked the Members of the House of Assembly, sycophants around the Governor who was making a fortune out of the taxes of Canada, spoke of "poor Peregrine . . . a thing called Excellency a British General who forgets the laws of honour, of prudence, feeling, justice," etc., etc.

The House, July 5, voted this a "scandalous, malicious and traitorous libel" and requested the prosecution of author, printers and publishers. Gourlay was let alone, but Bartimus Ferguson, the editor, was prosecuted on an Information *ex officio*. He was arrested at Niagara, brought to Toronto, produced before the Full Bench of three Judges and sent to Niagara for trial. Tried at the Niagara Assizes, defended by Thomas Taylor, our first Law Reporter, he was convicted and sent to gaol. In the following term he was brought to York and sentenced to pay a fine of £50 and to imprisonment in the Common Gaol at Niagara for 18 months, to stand in the pillory for four hours, and to give bonds for good behaviour for 7 years, remaining in prison until the fine was paid and security given. Ferguson made a humble submission and part of his punishment was remitted. Gour. 39, 50.

"Wilcox, Mallory and Maracle" were Joseph Willcocks and Abraham Marcle, members of the House of Assembly who deserted to the enemy in the War of 1812 and were expelled from the House, February 19, 1814—and Benajah Mallory, also accused of treason at the same time.

Daniel Washburn was struck off the Rolls in 1820 "for conduct of a highly disgraceful and criminal nature," which had already become common property: it was in his office that Barnabas Bidwell was managing clerk—and there Marshall Spring Bidwell began his professional training.

Mr. James "Durant" was James Durand, Member of the House of Assembly, a Reformer but not a friend of Gourlay's. Gour. p. 49. He was quite falsely accused of using for his own purpose certain public money given him to expend on roads.

"Hone" was William Hone, the well-known author and publisher; he began in 1817 publishing satires on the Government of Britain John Wilkes' Catechism and the like. He was prosecuted on an *ex officio* Information for publishing John Wilkes' Catechism, December 18, 1817, before Mr. Justice Abbott (afterwards Lord Tenterden) and acquitted. The Chief Justice Lord Ellenborough determined to preside himself at the next trial, which he did, December 19—an *ex officio* Information for publishing Hone's own "Political Litany," but Hone was again acquitted. The next day, December 20, Hone was again put on trial on an *ex officio* Information for publishing "The Sinecurists' Creed." Lord Ellenborough again presided, and again Hone was acquitted.—these prosecutions and their result killed Lord Ellenborough. Hone defended himself with extraordinary skill, vigour and learning, proving himself quite too much for Judge and Crown Counsel.

The best account of these three trials is to be found in William Tegg's "Three Trials of William Hone," London, 1876—more foolish, unfair and futile proceedings never were taken in any Court—the Trial is well worth reading as showing the lengths it was a century ago thought fair to go to destroy an agitator. The political invective of to-day or yesterday is but gentle remonstrance compared with that of a century ago. Major Simons was Titus Geer Simons, whose tarring and feathering at Dundas of George Rolph was the cause of the action of Rolph v. Simons, which resulted in the "amotion" of Mr. Justice Willis in 1828.

Gourlay's practice of publishing letters to and from his wife is well known—many such letters are to be found in "The Neptunian"—he seemed not to understand that there was any impropriety or indelicacy in the practice—Mrs. Gourlay had no reason to be ashamed of her letters.

¹⁸ The Secretary of Lord Durham, who had written simply informing Gourlay that Lord Durham had received his communications—Gourlay looked upon this as a slight—"The Durham Ox" will be found *Nep. No. 2, p. 26*; Gourlay seems to have been proud of this and his other doggerel.

¹⁹ The Episcopalians (or some of them) claimed to be the Established Church of Upper Canada; some of the Presbyterians claimed a share of the Clergy Reserves. The language quoted is from Gourlay's "Address to the Resident Land Owners of Upper Canada," of January 10, 1839. *Gour. p. 89.*

²⁰ Printed in *Nep. No. 7, p. 72.*

The monkey was William Lyon Mackenzie, who, indeed, was neither tall nor handsome.

"Pug," a pet name for a monkey.

"Jonathan's outpost" was Buffalo; and the playhouse the local theatre where an enthusiastic public meeting was held the night after Mackenzie's arrival in Buffalo—Monday, Dec. 11, 1837—on his flight from Upper Canada.

"Douce," Gourlay informs us, means "sedate, sober, decent".

Van Rensselaer was Rensselaer Van Rensselaer who took command of the Sympathisers; he had more ambition than brains and was more devoted to brandy than to tactics.

Navy Island in the Niagara River was the camping ground of the Sympathisers

The Third Session of the Thirteenth Parliament of Upper Canada (I Vic.) sat from December 28, 1837, till March 6, 1838.

"My Dear McNab" was Allan Napier MacNab, who roused "the Men of Gore" District during the Rebellion to some purpose.

"Romney Marsh"—Francis Bond Head was Assistant Poor Law Commissioner in Kent, and living at Cranbrook, when he was to his great astonishment made Lieutenant Governor of Upper Canada—a worse selection could scarcely be made—he was knighted at the same time.

Allan Napier MacNab was knighted in 1838 for his services during the Rebellion.

Edinburgh Castle was an Inn in Toronto, much frequented by Members of the House of Assembly.

²¹ Printed in *Nep. No. 7, p. 72.*

The Steamer *Caroline* was laid up at Buffalo but being chartered by Sympathisers, she was brought down to the River through a channel cut in the ice and taken to Fort Schlosser, opposite Navy Island, on the American shore. She took supplies including one cannon from the New York side of the River to Navy Island, but on the night of the 29th December, 1837, she was boarded by a Canadian expedition and set on fire.

In the diplomatic correspondence the Americans claimed that the Caroline carried only "articles of freight."

At, or near, Malden the Sympathisers, *i.e.* American invaders, were defeated and their General, Theller, and others were taken prisoner. At Point Pelé there was a short battle; the Short Hills west of the Niagara River was the scene of the latest attempt in that region against the Crown, resulting in death to nine, penal service to others; at the Windmill near Prescott, the unfortunate Pole, Von Schoultz was taken prisoner; he afterwards was hanged at Kingston with some of his followers; at Windsor, Col. John Prince met and defeated the invaders, killed some in battle, shot some after the battle and sent some to Toronto as prisoners.

The "monkey chock full of bile" was, of course, William Lyon Mackenzie; his rage against "Uncle Sam's tight collars" was due to the fact that convicted for an offence against the law of the United States in organising an expedition against Canada he was confined in the Gaol at Rochester for eleven months.

"The Globe" was *not* "The Toronto Globe."

FROM THE TRANSACTIONS OF THE ROYAL SOCIETY OF CANADA

THIRD SERIES—1921

VOLUME XV

THE SECOND PRESIDENT LINCOLN

by

Rendell Williams

OTTAWA

PRINTED FOR THE ROYAL SOCIETY OF CANADA

The Second President Lincoln

By RENDELL WILLIAMS

Presented by the Honble. WILLIAM RENWICK RIDDELL, F.R.S.C.

(Read May Meeting, 1921)

An American writer, Emerson Hough (who repeatedly calls himself a "Yankee"), in 1909 published a very interesting book called "The Sowing, a Yankee's View of England's Duty to Herself and to Canada."¹

On page 36 he says: "Generations hence, England still may be ruling Canada."

If a Canadian had asked Mr. Hough why he thought England was "ruling Canada," no doubt he would have cited The British North America Act, 1867²—the so-called "Constitution of Canada"—which, by section 9, provides that "the executive government and authority of Canada is hereby declared to . . . be vested in the" King—by other sections provides for a Governor General appointed by the King to carry on the government in the name of the King, for the appointment for life of all the Senators and Judges by the Governor General in Council, the members of the Council being chosen and summoned by the Governor General, that any statute of the Dominion can be disallowed and annulled by the King; he would point out that Canada cannot even amend her own Constitution and that the Parliament at Westminster could legally make laws governing Canada. The Canadian would say: "Yes, I guess that's so," and grin.

"But what has that to do with the second President Lincoln?" you say. Read on and see.

Near Atlanta, Georgia, on a small plot of poor land—if such a thing as poor land can be found in the South—lived a coal-black, full-blooded negro. Born in 1867, he was christened Abraham Lincoln, after the idolized and martyred President—we should perhaps say martyred and idolized President, for there was little evidence of idolizing before the martyrdom.³ Naturally the name was contracted to Ab'm Linkum, but that did not grieve him. It would indeed have taken a great deal to make him downcast—over six feet in height, broad in proportion, the picture of health, shining like a mirror in the sun, he spent his days in joyous abandon interrupted

only occasionally by the stern necessity of work to provide food and at least vestiges of clothing for Aunt Mandy and her twelve sable offspring. The eldest was, of course, Ab'm, but for the successors were chosen names taken from the breast-plate of the Hebrew High Priest, for the couple had in their honeymoon been profoundly impressed by the gorgeous succession of names of precious stones read most sonorously if somewhat lacking in orthodox pronunciation by their coloured pastor. And so there were Sardius and Topaz, and Carbuncle (contracted to "Uncle"), and Emerald (who, though a boy, was "Emmy"), and Sapphire ("Fire"), and Diamond, Ligure (generally by a natural association of ideas called "Moonshine"), and Agate ("Aggie"), and Amethyst and Beryl (transmogrified into "Barrel"), and Onyx—her, Aunt Mandy thought well named as she came onexpected. The fruitfulness of the happy couple had not yet got so far as to produce a Jasper, "the only real nigger name in the bunch" as the envious neighbours declared; but hope was not dead.

Thus flourished the happy family in Georgia when the great day came around, the day fixed by the Act of January 23, 1845, the Tuesday after the first Monday of November; and there were chosen by the citizens of each State a certain number of gentlemen, not being Senators, or Representatives, or holding offices of trust or profit under the United States, and not having violated an oath previously taken to support the Constitution of the United States by engaging in insurrection or rebellion against the same or giving aid or comfort to the enemies thereof.

These were the men who were to select the President of the United States for four years, irremovable except by death, resignation or impeachment—and Presidents seldom die and never resign, while no one tries an impeachment since the attempt failed with Andy Johnson. In case of inability to perform the duties of his office, the Vice-President receives the powers of the President, but even partial paralysis cannot disable a President, and that last resort of a patriot, a bullet, could not disable one who had been a College President like Garfield—it had not yet been tried on Wilson but would, if tried, be certain to fail unless it killed.

These men, too, select the Vice-President who may, like Roosevelt, succeed to the Presidency.

The Constitution of the United States was framed by men who feared the wild passions of the mobility—"great importance was attached by the framers of the Constitution to the interposition of the electoral college between the passions and prejudices of the

undiscriminating multitude of voters and the high office of President."⁴ They feared that if the Legislature should elect a President it would be the work of intrigue, of cabal and of faction, it would be like the election of a Pope by a conclave of Cardinals and that real merit would rarely be the title to the appointment.⁵ Election by the people was liable to the most obvious and striking objections; they would be led by a few active and designing men⁶ and it would be as unnatural to refer the choice of Chief Magistrate to the people as it would be to refer a trial of colours to a blind man.⁷ A popular election would be radically vicious; the ignorance of the people would put it in the power of one set of men dispersed through the Union and acting in concert to delude the people into any appointment.⁸

So the Fathers determined that the appointment of President should be left to Electors. These, of course, would be men of high standing and clear judgment, not filled with party spirit or influenced by regard for any man; they would feel the very great responsibility cast upon them and would anxiously canvass the merits of all natural born citizens of the United States who had attained the age of 35 years and had been for 14 years residents of the United States and they would vote for those best qualified for the high offices of President; he who received the most votes would become President and he who received the next greatest number Vice-President. And thus there would be no intrigue, no cabal, no faction, the people would not be led by a few active and designing men, no one set of men, senators or others, acting in concert could determine the appointment, and real merit would be the sole title to the office.

The selection of these electors being thus of the most serious importance, the citizens of each State examined with the greatest care into the past history, the ability, clearness of vision, soundness of judgment, uprightness and candour of the prominent citizens, to see who should be entrusted with the grave responsibility of acting for them in the selection of their future four year Monarch. An ordinary agent for every day affairs or a lawyer, one might take chances on, but a Presidential Elector! Never, no sir, never.

And so it came about that in at least most of the States a minimum of ten per cent. of the voters knew one, or possibly even two, of those for whom they voted, sometimes indeed only by name but occasionally by sight.

Naturally these splendid specimens of American citizenship were impressed with the tremendous importance of their solemn task; and naturally they communicated with each other most seriously, asking and giving advice and exchanging views.

It early appeared that the great majority were whole heartedly determined that autocracy should end, that there was to be no more one man rule—of course, it was recognized that the President had more power than that old tyrant George III ever pretended to, but while it is excellent to have a giant's strength, it is not the thing to use it like a giant; and so, as it was no longer good form to temper autocracy with assassination, at least in America, they thought it wise not to appoint any one likely to kick over the traces and try to play the strong man. What kind of a man to get?

Believing with Dryden that

“By education most have been misled,”

remembering that Tommy Wilson was a real nice boy before he went to College and Stevie Cleveland was modest, if not meek, before he studied for the Bar, they determined that no highbrow should occupy the White House, not one darned College President or lawyer—these were too sot, too determined to have their own way, too pig-headed to admit of proper steering. This cut out Champ Clark on both counts as well as certain well-known men who, though politicians, are still lawyers. I mean such men as Elihu Root, William Howard Taft, George Wickersham. I am not quite so sure of Selden Spencer, in whom the Spencer perhaps predominates rather than the Selden, or of Henry Cabot Lodge, but then his middle name entitled him in the land of the Bean and the Cod to familiar converse with the Highest, and that had been found fatal by the experience of Germany. What more education does a President want anyway than just to read and write? And while Dogberry may have been a little astray when he thought “to write and read comes by nature,” he was infinitely right in his noble precept “for your writing and reading, let that appear when there is no need of such vanity.” This type-writing craze, this *cacoethes scribendi epistolarum magnarum doctarum eruditumque* had to come to an end, especially in the existing scarcity of paper; the ordinary individual should have some chance of getting writing material.

Accordingly a man of limited education was a desideratum, and the more limited the education, within limits of course, the better. No stubborn, stiff-necked, intellectually proud man, but an easy-going man and a pliable, one who would do as he was told by his betters at the other end of the Avenue—that must be the aim.

Having decided the kind of a man to be chosen other considerations arose. That blamed South, which had never forgotten its former ascendancy, which could not be weaned from its self-

sufficient adhesion to its time-honoured politics, which could not be got to acknowledge the superiority of the North, had to be taught a lesson. The mere election of a Northerner would not be sufficient; Cleveland and Harrison and McKinley and Roosevelt and Taft were from the North, and some other means must be adopted. A brilliant thought struck the mind of Mr. —, Mr. —, Mr. —, whatever is his name? You know, every American knows, the man I mean—the man who got the most votes in Ohio, Mr. —, but no matter what the name—let us say one of the most illustrious of the Electors and let it go at that. He said: "Let us pick out a Southerner, one of a class which the Southerners despise, and put him over them"—Agreed—but "surely you don't mean a nigger?" "Why not?" "Why not, indeed?" Agreed and agreed.

And then another illustrious Elector—blame my treacherous memory anyway—why can't I remember the name of that remarkable man? Another illustrious Elector said that he had spent the previous winter in Georgia, had noticed the big, indolent, jolly black with the historic name and numerous progeny; that no one respected him but everybody liked him, thereby reversing the situation of the present occupant of the White House, that he was biddable and not uppish, not like—but why continue? What was wanted was a complete change. The South, which had resented Roosevelt seating Booker Washington at his table, would now see a Bookerer than Booker sitting in Washington's chair and learn their place. Moreover, there would be the incidental advantage that Roosevelt's favourite injunction to the American people would be constantly in mind and race suicide would be discredited.

The second Abraham Lincoln came in state to Washington, Aunt Mandy rules the White House with an unskilled and gentle rule, Ab'm Junior is the cock of his school and little Onyx can be seen any fine day sporting her red and yellow stockings on the lawn—stockings the first she had ever possessed but they are gorgeous.

Which things are an allegory—the legally possible is the morally impossible; evils elaborately guarded against are wholly imaginary and non-existent or at the worst negligible, and the prophylactic precautions are full of the very evils they are designed to prevent.

The Electoral College is the only piece of camouflage in the American Constitution. The Constitution of Britain and of Canada is the most elaborate and successful system of camouflage the world ever saw. If one sees anything laid down in the American Constitution it is—except that farcical College—certain to be so; if in the British Constitution it is certain not to be so. The American

Constitution, as a whole, and speaking generally, was framed *uno ictu* by acute and able statesmen as a permanent thing; it was necessarily in writing and *littera scripta manet*; the meaning at one time is the meaning at another, time writes no wrinkles on its austere brow. The British Constitution was not made, it was not even born—like Topsy, it just grew; it is largely unwritten and the very words in which it may be explained change their meaning with the changing times. It is continually grafting new shoots on the old stock, building more stately mansions on the old foundations; clinging fondly to the old names, the old ceremonies, the old forms, it is constantly moulding the old methods to new uses, and adapting the old to the purposes of the new.

Hence it is that the King, nominally King by the Grace of God, is in reality King by grace of an Act of Parliament; head of Army and Navy, he does not appoint an officer, however humble, in either; Defender of the Faith because his predecessor received the title from the Pope for defending the faith against the heretic Martin Luther, though he, George V., must by law be a Protestant; having the right to refuse the royal consent to any Bill passed by Parliament, though that has not been done since the times of William III; and able to select his Ministers from any of the millions of the British subjects to be found wherever the map is coloured red, so long as he selects those whom the House of Commons choose for him—appointing Judges, Ambassadors, Envoys, whom he never saw or heard of—creating Earls, Viscounts, Barons, Baronets, Knights *et hoc genus omne*, but only as the Prime Minister directs,⁷ and to cap the climax, King of the United Kingdom of Great Britain and Ireland! United? Ask De Valera (the successor of the Pagan Era and the Christian Era).

So the power exists on paper for Britain to legislate for Canada, which she is as likely to do as the Electoral College to elect the Georgia Negro and no more likely—the Home Administration at Westminster may annul Canadian legislation just as the King can refuse the Royal Assent to a British Bill. The Governor General has, in Canada, substantially the powers of the King in England, but he exercises them in the same way; he must have as Ministers those approved by the House of Commons at Ottawa, the members of which are elected by the people of Canada, and these Ministers must get out and leave room for others if they cannot obtain a majority of the House of Commons. These Ministers in fact appoint Senators, Judges, Commissioners (who are often really Ambassadors) and the Governor General has his appellation on the *lucus a non lucendo*¹⁰ principle because he does not govern.

Canada pays no tribute and owes no obedience to England; she frames her own tariff, and when that tariff conflicts with some old treaty that England had made which in form bound Canada, she insists that it be denounced and denounced it is.

Canada has her own Army and her own Navy commanded by Canadians; she put half a million men under arms in the last war, and sixty thousand of them made the supreme sacrifice—the Mother Country could not call upon her for a man or a dollar except as Glendower could call spirits from the vasty deep. “But will they come?” said the sceptical Hotspur. Canadian soldiers crossed the sea in 1914 and following years until 1918 as Canadians, with Canadian uniforms, Canadian rifles, Canadian horses, Canadian cannon, Canadian ammunition, under Canadian officers paid by the Canadian Government and cared for by Canadian doctors and Canadian nurses. And when Canadians were dying for freedom and democracy their government demanded a part in determining the course of the struggle; Canada’s Prime Minister joined the Prime Ministers of the other self-governing Dominions and the Prime Minister of Britain in a War Cabinet on equal terms and with equal authority, and the War Cabinet directed the war on behalf of the British Empire. Canada took part in negotiating the Peace Treaty and signed it as a party after a vain protest against Article X; her representatives joined Australia in refusing to consent to a declaration of Japanese equality and fought England and the United States to a standstill on the question; her Parliament approved the Treaty with the reservation of the right to have it amended; she has taken a prominent part at Geneva and pays no heed to the wishes of England where these conflict with her own interests. Canada is an independent self-governing nation but she will not allow anything to separate her from the rest of the British world. She is British to the last drop of her blood and intends to remain so. England has not for many a day ruled, and never will, rule Canada. She may try it when Ab’m Linkum becomes President of the United States, but assuredly not a minute sooner.

All of which is unintelligible to the lawyer who reads the Statutes only; but is a living truth, the glory and the pride of Canadians. When the lawyer is puzzled beyond all bearing let him contemplate little Onyx with her gay stockings on the White House lawn.¹¹

¹Chicago, London, Toronto, Vanderhoof, Gunn, Co., Ltd., Winnipeg, 1909. Cloth. Cr. 8vo., pp. 222.

²(1867), 30, 31 Vict., c. 3. (Imp.)

³Of which let one Woodrow Wilson take notice and be comforted.

⁴Handbook of American Constitution Law, by Henry Campbell Black, M.A., 3rd edit., St. Paul, 1910, p. 107.

⁵Gouverneur Morris loquendo et arguendo. Journal, pp. 365-368.

⁶So Pinckney of South Carolina.

⁷Mr. Mason's opinion—but then he came from Virginia and knew his people.

⁸Gerry not yet mandering.

⁹When Beaconsfield made his secretary a Peer it was said that he followed the precedent of Caligula, who made his horse, Incitatus, a Consul. It would seem that Incitatus, "Flyer," though he was given a marble stable, an ivory stall, purple trappings and a jewelled collar, failed of the Consulate—at all events Suetonius says: "Consulatum quoque traditur destinasse" and Dio Cassius, "Consulemque se eum creaturum pollicebatur; facturus si diutius vixisset"—it was well that "non diutius vixit."

Canada has put an end to this title business (so far as her citizens are concerned) by resolution of her House of Commons.

When I was a lad my old Scotch tutor taught me that "lucus", a sacred wood or thicket was the same as "lucus," light and that both came from "luceo" (I shine), because the latter did, and the former did not shine. On the same *lucus a non lucendo* principle are "Bellum," war, because it was not bellum, agreeable: "Canis," a dog, because it does not sing, a *non canendo*, etc., so also "Woodrow" because he wouldn't row but insisted on steering, and a stream I knew in my boyhood was "Trout Creek" because there were no trout in it.

¹¹For what says the modern Mother Shipton—more up to date than the ancient of Knaresborough?

"When Onyx sports on White House lawn
And flourishes her gaudy legs,
Then Canada, her freedom gone,
Will drain of slavery's cup the dregs."

FROM THE TRANSACTIONS OF THE ROYAL SOCIETY OF CANADA

THIRD SERIES—1922

VOLUME XVI

PRESIDENTIAL ADDRESS

UPPER CANADA A CENTURY AGO

BY

The Honourable William Renwick Riddell,
LL.D., F.R.S.C., Etc.

OTTAWA

PRINTED FOR THE ROYAL SOCIETY OF CANADA

1922

Transactions of the Royal Society of Canada

SECTION II

SERIES III

MAY, 1922

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By THE HONOURABLE WILLIAM RENWICK RIDDELL, LL.D., F.R.S.C.,
Etc.

(Read May Meeting, 1922)

It will not seem inappropriate that I should address a Section of a Canadian Society devoted, *inter alia*, to History, upon the state a hundred years ago of one Province—now a Province of the Dominion of Canada—and it is natural that I should select my own Province, then called Upper Canada.

Upper Canada came into existence, technically, by the Order-in-Council at the Court of St. James's, August 24, 1791, whereby the Province of Quebec was "divided into two distinct Provinces to be called the Province of Upper Canada and the Province of Lower Canada."¹ But the government of the new Provinces was provided for by the Canada or Constitutional Act (1791), 31 George III, c. 31 (Imp.), which was brought into force, Monday, December 26, 1791, by the Proclamation of General Alured Clarke of November 18, 1791.²

The Province of Upper Canada had as its eastern limit a line beginning at a stone boundary on the north bank of the Lake St.

¹"Documents Relating to the Constitutional History of Canada, 1791-1818." Doughty and McArthur, Ottawa, 1914, pp. 1-3; 4 Ont. Arch. Rep. (1906), pp. 158-160.

²The Canada Act (1791), 31 George III, c. 31 (Imp.), s. 48, provided that the King might fix or authorize the Governor or Lieutenant-Governor of the Province of Quebec or the Administrator of the Government there to fix the day for the commencement of the Act. The Order-in-Council of August 24, 1791, ordered Henry Dundas (afterwards Lord Melville), Secretary of State for the Home Department (which was charged with the care of the colonies, 1782 to 1801), to prepare a warrant for the Royal Sign Manual authorizing the Governor, Lieutenant-Governor or Administrator of the Province of Quebec to fix the day not later than December 31, 1791. The warrant issued: Lord Dorchester, the Governor of the Province of Quebec, was still in England, and Alured Clarke, the Lieutenant-Governor, fixed the day by his Proclamation. For this Proclamation see D. & McA., pp. 55-57; 4 Ont. Arch. Rep. (1906), pp. 169-171.

Francis, at the Cove west of Pointe au Bodet and running northerly in a defined direction until it struck the boundary line of Hudson Bay, "including all the territory to the westward and southward . . . to the utmost extent of the country commonly called or known by the name of Canada."³

It had been found impossible to follow the description of the eastern boundary exactly, but the Surveyor-General drew a satisfactory line⁴—there was no need to be particular about the northern boundary, settlement had not gone so far in that direction. Toward the United States, to the west and south, the boundary had been defined by the Definitive Treaty of Paris, 1783, the middle line of the St. Lawrence, the Great Lakes and their connecting rivers.⁵ While part of the *de jure* territory of the United States had been detained for a time by Britain and was *de facto* part of Upper Canada, it had all been given up in 1796 under the provisions of Jay's Treaty, 1794.⁶

The precise line had not been fixed in certain places one hundred years ago. There was a dispute as to the international line; and by the Treaty of Ghent, December 24, 1814, the matter was agreed to be referred to two Commissioners, one on each side.⁷

The first British Commissioner was John Ogilvy of Montreal, but he died at Amherstburg in 1819 of fever caught in the swamps of

³There is a misprint of the word "of" for "on" in the copy in 4 Ont. Arch. Rep. (1906), p. 159—the original capitalization has not been followed in this copy.

⁴See the note on the map opposite D. & McA., p. 72—the mistake was in the Order-in-Council.

⁵This Treaty is given in "Documents Relating to the Constitutional History of Canada, 1759-1791," edited by Shortt and Doughty, 2nd edit., Ottawa, 1918, pp. 726-730. "Treaties and Conventions, United States, etc." Washington, 1889, pp. 375-379.

The statement in the text as to the northern boundary is not exactly correct—already there was a desire for a port on Hudson Bay. See Baldwin's Motion in the Assembly, December 29, 1823, 10 Ont. Arch. Rep. (1913), pp. 564, 589. I have shortened the description of the treaty boundary between Canada and the United States.

⁶The border ports of Michillimacinack, Detroit, Niagara, Oswego, Oswegatchie, Point au Fer, Dutchman's Point, were held by Britain because the United States had not implemented their agreement that the British creditors should find no lawful impediment to the recovery in full of their claims on American debtors. Washington, April 16, 1794, sent John Jay, Chief Justice of the United States, to England and he, November 19, 1784, secured a treaty whereby the United States were to pay the retained debts and Britain to give up the retained territory. Britain gave up the territory in 1796 and the United States paid £600,000 in 1802.

Jay's Treaty will be found in "Treaties and Conventions, etc.," pp. 379-395.

⁷The Treaty of Ghent, "Treaties and Conventions, etc.," pp. 399-405.

St. Clair and was succeeded by Anthony Barclay of Nova Scotia. The American Commissioner was General Peter Buel Porter of Niagara, who had made a good record as a soldier in the war of 1812-14 and was later to be Secretary for War in Adams' Cabinet. They made an award at Utica, June 18, 1822, which was carried into effect.

The Commissioners had not agreed; but the British Government gave Barclay specific instructions to give up to the United States Sugar, Fox and Stony Islands in the Detroit River as the price of an immediate amicable determination of the boundary under the Treaty of Ghent—the United States giving up all claim to Bois Blanc.⁸

The Utica Award settled all difficulty as to the United States boundary to the Neebish Channel; and the Convention of October 20, 1818, fixed a line from the most northwestern point of the Lake of the Woods to the 49th Parallel, N.L. The Ashburton Treaty of 1842 fixed the line from the Neebish Channel to the most northwestern point of the Lake of the Woods.

⁸See letter Anthony Barclay to Sir Peregrine Maitland, Lieutenant-Governor of Upper Canada, dated from Utica, June 21, 1822, *Can. Arch. Sundries, U.C.*, 1822.

The Utica Award, "Treaties and Conventions, etc.," pp. 407-409.

It is foreign to my subject to more than refer to the dismay and resentment of many in the Province at the Award to the United States of Barnhart's Island, near Cornwall, now part of Massena Township in St. Lawrence County, New York. The Legislature of Upper Canada made a strong representation to the Crown expressing inability to conceive on what grounds a boundary was assented to which gave to the United States "the only deep and safe channel" and asserting that it was "wholly impracticable for rafts of timber, staves and other lumber, which are among the principal exports of Upper Canada, to descend to the only market . . . open to them by the shallow, dangerous and intricate channel on the north side of Barnhart's Island."

The matter came up very frequently in the House during 1823 and 1824—see 11, *Ont. Arch. Rep.* (1914), pp. 269, 272, 274, 275, 276, 280, 458, 472 (where Barnhart's Island is first specifically mentioned, November 27, 1823), 473, 474, 476, 480 (an answer by the Lieutenant-Governor that that part of the boundary had undergone a careful survey and examination by the Commissioner of the Navy, who had made a Report to the Secretary of State for the Colonies, December 1, 1823), 538, 614, 615 (Resolutions of Assembly, January 6, 1824), 623, 624, 666, 667 (Address to the Lieutenant-Governor, January 16, 1824), 674, 676 (Address to the King, January 17, 1824), 683.

In the Legislative Council, 12 *Ont. Arch. Rep.* (1915), pp. 240, 241, 245, 247, 262, 265, 266, 271, 278, 279, 280. (The indexing to these volumes is very unreliable, being the only serious defect in this otherwise admirable series.)

The Ashburton Treaty of 1842 by Article VII made the channels on both sides of Barnhart and Long Sault Islands open to ships, etc., of both parties. "Treaties and Conventions, U.S., etc.," pp. 432 *sqq.*

The western boundary of the Province was still uncertain; claims were made that Upper Canada extended to the Rocky Mountains and also that it extended not quite to the head of Lake Superior—this boundary was finally settled in its present position in 1889 by the Act 52, 53 Vict., c. 28 (Imp.).⁹

DISTRICTS

The judicial and administrative unit was still the District; there were, indeed, Counties, but these were practically but convenient names for certain portions of territory. Townships had an embryo municipal system, but the District was the important matter. Each District had its District Court with jurisdiction in contract from 40 shillings to £15 (in liquidated claims to £40), and in tort to personal chattels to £15. It had its Court of Quarter Sessions for criminal cases, its Sheriff, Constables, etc. The Court of Quarter Sessions levied the taxes, laid out roads, etc.—and it was the real municipal authority.¹⁰

The Lieutenant-Governor was Sir Peregrine Maitland; he had shaken off the influence of Chief Justice William Dummer Powell;

⁹The Quebec Act (1774), 14 George III, c. 83, extended the Province of Quebec to the Ohio River down to "the banks of the Mississippi and northward to the southern boundary of the territory granted to the Hudson's Bay Company."

The true boundary of Upper Canada depended on the meaning of the word "northward," Sir John A. Macdonald, in the historic controversy with Sir Oliver Mowat, claiming that it meant "due north," Sir Oliver that it meant "northerly along the banks of the Mississippi." In the event, the latter interpretation prevailed in the Judicial Committee, 1884, as it had with the arbitrators, Chief Justice Harrison, Sir Francis Hincks and Sir Edward Thornton, 1878, whose unanimous award Sir John refused to accept. The decision of the Judicial Committee, August 11, 1884, was carried into legal effect by the Imperial Act of 1889.

¹⁰For the District Court see the Act (1822), 2 George IV, c. 2 (U.C.); for the assessment, etc. (1819), 59 George III, c. 7 (U.C.). Under 15/ was sued for in the Court of Requests presided over by Justices of the Peace—this became the Division Court in 1841, 4, 5 Vict., c. 3 (U.C.). The Districts were abolished in 1849 by the Act 12 Vict., c. 78 (Can.), and the County became the judicial unit, District Courts becoming County Courts.

The Districts in existence in 1822 were:

1. Eastern, created as District of Lunenburg by Lord Dorchester's Proclamation of July 24, 1788; name changed by Act (1792), 32 George III, c. 8 (U.C.).
2. Midland, Mecklenburgh by same Proclamation and name changed by same Act.
3. Home, Nassau by same Proclamation and changed by same Act.
4. Western, Hesse by same Proclamation and changed by same Act.
5. Johnstown, formed 1798, 38 George III, c. 5.
6. Niagara, formed 1798, 38 George III, c. 5.

John Beverley Robinson, the able Attorney-General, had now more influence with him—by no means so great as was generally supposed, however.

Already there were movements looking towards responsible government; the Legislature had in 1816 voted £2,500 towards the expense of the administration of the civil government of the Province;¹¹ and this entitled the people's representatives to a say in who should spend it. But nothing seemed further from the official mind than this; and the Executive Council was still responsible to the "Crown" alone. The Eighth Parliament was sitting. The Legislative Council was nominated; as in the case of the members of the Executive Council, a mandamus was issued by the Home Administration, and the nominee was entitled to be sworn in. In the Legislative Council the practice was that the Chief Justice was the Speaker; and Powell was the incumbent from before his appointment as Chief Justice in 1816 until he retired in 1825.¹²

In the Legislative Assembly every county with a population of 1,000 had one member, those with a population of 4,000, two each, the representation of no county to be reduced, and every town in which the Quarter Sessions sat had one member—41 members in all.¹³

7. London, formed 1798, 38 George III, c. 5.

8. Newcastle, authorized by same Act, formed *de facto*, 1802.

9. Ottawa, formed 1816, 56 George III, c. 2.

10. Gore, formed 1816, 56 George III, c. 14.

(Provision was made (1821), 2 George IV, c. 3, for the Counties of Carleton and Simcoe to be proclaimed Districts.)

¹¹The Statute granting this money is (1816) 56 George III, c. 26 (U.C.); it has not, *me judice*, received the attention which it deserves. Before 1816, the Mother Country paid the whole expense of the civil administration of the Province and it would have been illogical for Canadians to ask to dictate who should spend the money. The opposition of Weeks, Willcocks, Thorpe, etc., in 1806 seems to have been simply factious.

¹²In addition to the (1) Speaker there were present during the Session of 1821-22:

2. James Baby.
3. John McGill.
4. Thomas Scott (former C.J.).
5. William Claus.
6. William Dickson.
7. Revd. John Strachan.
8. Angus McIntosh.
9. Joseph Weeks.
10. Duncan Cameron.
11. George H. Markland.

(They were paid £100 a year except when they were Honorary members.)

¹³This was provided by the Act (1820), 60 George III, c. 2 (U.C.).

The following counties had at least two members:

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| (a) Glengarry: | 1. Alexander Macdonell, York. |
| | 2. Alexander McMartin, Cornwall. |
| (b) Prescott & Russell: | 3. William Hamilton. |
| | 4. David Pattie, Hawkesbury. |
| (c) Stormont: | 5. Archibald McLean, Cornwall. |
| | 6. Philip Van Koughnet, Cornwall. |
| (d) Grenville: | 7. Walter F. Gates, Johnstown. |
| | 8. Jonas Jones, Brockville. |
| (e) Leeds: | 9. Levius P. Sherwood, Brockville (Speaker). |
| | 10. Charles Jones, Brockville. |
| (f) Lennox and } Addington } | 11. Samuel Casey, Adolphustown. |
| | 12. Barnabas Bidwell, Kingston. |
| (g) Prince Edward: | 13. James Wilson, Picton. |
| | 14. Paul Peterson, Hallowell. |
| (h) Northumberland: | 15. David McGregor Rogers, Haldimand. |
| | 16. Henry Ruttan, Haldimand. |
| (i) York & Simcoe: | 17. Peter Robinson, York. |
| | 18. William W. Baldwin, Spadina. |
| (k) Wentworth: | 19. George Hamilton, Hamilton. |
| | 20. John Willson, Saltfleet. |
| (l) Halton: | 21. James Crooks, Dundas. |
| | 22. William Chisholm, Nelson. |
| (m) Lincoln: | |
| 1st Riding: | 23. John Clarke, St. Catharines. |
| 2nd Riding: | 24. William J. Kerr, Waterford. |
| 3rd Riding: | 25. Robert Hamilton, Queenston. |
| 4th Riding: | 26. Robert Randall, Queenston. |
| (n) Middlesex: | 27. Mahlon Burwell, Port Talbot. |
| | 28. John Bostwick, Talbot Settlement. |
| (o) Norfolk: | 29. Robert Nichol, Stamford. |
| | 30. Frances Legh Walsh, Vittoria. |
| (p) Essex: | 31. Francis Baby, Sandwich. |
| | 32. William McCormick, Amherstburgh. |

The following counties had one member each:

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| (q) Dundas: | 33. Peter Shaver, Matilda. |
| (r) Frontenac: | 34. Allan McLean, Kingston. |
| (s) Carleton: | 35. William Morris, Perth. |
| (t) Hastings: | 36. Reuben White, Belleville. |
| (u) Durham: | 37. Samuel Street Wilmot, Clarke. |
| (v) Oxford: | 38. Thomas Horner, Burford. |
| (w) Kent: | 39. James Gordon, Amherstburgh. |

And the towns with one member each:

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| (x) Kingston: | 40. Christopher Alexander Hagerman, Kingston. |
| (y) York: | 41. John Beverley Robinson, York. |

One of the most interesting episodes in our parliamentary history occurred in this Parliament.

Barnabas Bidwell, who had been Attorney-General of Massachusetts, 1807-1810, and a member of Congress, fled to Upper Canada in 1812, having been charged with embezzlement. He was elected as a member of the Legislative Assembly for Lennox and Addington at a by-election, November 5, 1821; petitioned against as an alien, he was unseated by the House, January 4, 1822; at the election ordered, the Returning Officer refused to accept the nomination of Marshall Spring Bidwell, his son; and of the two other candidates, Matthew Clark and Thomas Williams, the former was elected, February, 1822. Clark was unseated, February 14, 1823, and at the new election Marshall Spring Bidwell and George Ham were the candidates. Ham was declared elected on a poll 518 to 505, but was unseated on petition, December 8, 1823. A new election was ordered by the House, but the Parliament was dissolved. At the ensuing general election in 1824, Marshall Spring Bidwell was returned a member for this constituency along with Peter Perry, another advocate of responsible government.

The right of immigrants from the United States to vote and to be Members of the House was a burning question which agitated the Province for years; it resulted in the Act of (1824) 4 George IV, c. 3 (U.C.), which effectually excluded such as Barnabas Bidwell, but qualified his son.¹⁴

Another matter which caused the Legislature much concern was the difficulty with Lower Canada over the proportion of duties to be paid by that Province to Upper Canada.

Practically all the goods imported into Upper Canada from the British Isles came up the St. Lawrence and Lower Canada levied a tariff upon such goods; and an arrangement was entered into through Commissioners appointed by the Governors (see the Upper Canada Act (1793), 33 George III, c. 9), whereby Upper Canada refrained from imposing duties upon goods coming through Lower Canada and the two Provinces divided the duties levied by Lower Canada. Commissioners were appointed in 1793, 1796, 1801, 1804, etc., down to 1817—when the arrangement made by the last-mentioned Commissioners expired in 1819 a very considerable agitation arose between the Provinces. Lower Canada kept all the money.

¹⁴The subsequent career of Marshall Spring Bidwell is too well known to call for comment here. The facts concerning the elections, etc., will be found set out in 10 Ont. Arch. Rep. (1913)—Kingsford's account is inaccurate.

I have discussed this matter somewhat fully in my article, "The Tragedy of the Bidwells."

Early in 1821, Sir Peregrine Maitland drew the attention of Parliament to the matter and it was carefully considered. A Joint Committee of both Houses made an elaborate report, December 22, 1821, setting out in detail the history and the difficulties which had arisen, and recommended that "A person of talent and respectability sufficient to solicit and represent the interests of this Province should be commissioned to present the Address at the foot of the Throne." Chief Justice Powell expected to be appointed and had been spoken to by the Lieutenant-Governor in that sense, but both Houses united in an Address to Sir Peregrine Maitland asking him to appoint John Beverley Robinson, the Attorney-General, who had had general charge of the matter for the House and who probably knew more about it than any one else. Robinson was appointed, to Powell's dismay and indignation, and this put an end to the lifelong personal friendship of these two eminent men.¹⁵

When Robinson was in England he combated the scheme which had been decided upon by the Home Administration for the Union of the two Canadas: in this he did not act officially but expressed his own views. Opinion was divided in the Province as to the merits of the proposition: it would not be very far from literal fact to say that, on the whole, the Liberals were in favour and the Tories adverse. However that may be, the House, by a vote of 18 to 15, resolved that the representatives did not feel themselves competent to speak on such an important matter for their constituents, as the proposed change had not been contemplated at the time of the election: a subsequent motion to expunge was lost on a vote of 4 to 18.

The Legislative Council passed an Address to His Majesty confessing their "inability to decide upon the general policy of the measure."¹⁶

The very strongest opposition was manifested in Lower Canada, and the Bill was allowed to drop—the matter not to be seriously taken up again till after Lord Durham's Report.

¹⁵See this Report in 11 Ont. Arch. Rep. (1914), pp. 97-115. Address for the appointment of Robinson, 11 Ont. Arch. Rep. (1914), pp. 164, 176. For the quarrel see the Powell MSS. and many letters of Robinson, Strachan and others in the Can. Arch. Sundries, U.C., 1822. Powell shows up very badly in this matter—*ira furor brevis*—apparently his usual robust common sense failed him, and indeed a general failing of his faculties is noticeable at this time. *Valde deplendus*.

¹⁶The Draft Bill will be found 11 Ont. Arch. Rep. (1914), pp. 237-243. The proceedings in the House are in 11 Ont. Arch. Rep. (1914), pp. 300, 303, 304, 310, 311, 318, 322 (Resolution), 342 (Motion to expunge); in the Council, 12 Ont. Arch. Rep. (1915), pp. 145, 146 (the Address).

The most interesting, if not the most valuable, documents concerning Upper Canada a century ago, are to be found among the Sundries, U.C., in the Canadian Archives; and I shall devote the remainder of this paper to what is either expressed in these documents or is indicated or suggested by them.

The reports of the judges to the Lieutenant-Governor throw a lurid light on the brutality of the criminal law, but at the same time often indicate the means taken to mitigate its rigours.

Mr. Justice Campbell took the Home Circuit at Hamilton¹⁷ (now Cobourg) for the District of Newcastle, September 18. At the Newcastle Assizes was tried an Indian lad, Negaunausing, ten years old, who had shot "a European boy, John Donaldson, of nearly the same age." He was a bright and intelligent lad; he quite understood what he was doing and his nonage did not save him from conviction for *Malitia supplet aetatem*. He was sentenced to death.

Mr. Justice Campbell made a formal report. The case of the young Indian was taken up by Charles Fothergill of Rice Lake and Port Hope,¹⁸ and the matter again submitted to the trial judge for his opinion. He advised clemency: although the boy undoubtedly understood the act and intended the result, there were three reasons for mercy—his youth, his ignorance of the consequences to himself of the crime, and the absence of any previous quarrel or illwill.

¹⁷Called after the township in which it is situated. For some time after the foundation of the present city of Hamilton there was a distinction made between Hamilton and Hamilton in the Gore District. The name Cobourg was well established by 1821 when the Sheriff received a charter for a fair "in the town of Cobourg in the Township of Hamilton," August 2.

For a provision for sale of the old site after construction of the new Court House see the Statute (1836), 6 Wm. IV, c. 23 (U.C.); but that is another story.

¹⁸Charles Fothergill, J.P., was an Englishman of superior education; he had an elegant cottage at Port Hope and a residence on Rice Lake. He spoke against Robert Gourlay at the memorable meeting of the inhabitants of the Township of Hope and Hamilton in 1818 which ended Gourlay's hope of success in the District of Newcastle. He became King's Printer in 1821, published the *Gazette* and the *York Almanac*. He, however, lost that situation in 1826 on account of his conduct in the House of Assembly in which he was member for Durham. He was an accomplished naturalist and wrote several volumes of manuscript on the animals and birds of the continent. He supplied the celebrated artist, Bewick, with a horned owl stuffed for illustration, and took an active part in an abortive scheme for a Museum and Institute of Natural History and Philosophy with Botanical and Zoological Gardens attached at York (Toronto). See my "Life of Robert (Fleming) Gourlay," *Ont. Hist. Soc. Papers and Records*, vol. 14 (1916), pp. 37, 60.

The Indian name "Ganaraska" was replaced by "Smith's Creek" from the mill stream at whose mouth it was built—as Cobourg, seven miles east, was sometimes known as Perry's Creek—the village Ganaraska had the name Toronto for a short time, but when made a Port of Entry the permanent name Port Hope (from the township in which it was situated) replaced all others (1820-21).

It was nearly a year before the pardon was decided upon, and the boy lay in gaol at Cobourg. When the pardon was granted it was on condition that the chiefs of the tribe to which he belonged should give security that he would banish himself from Upper Canada for life. On this being transmitted to the Sheriff of the Newcastle District, John Spencer, he was in a quandary as to the form the security should take and wrote to Major Hillier.¹⁹ How the matter was arranged does not appear, but it is quite certain that the boy was not hanged.²⁰

John Brown, lying in the gaol at York sentenced to death for stealing, is "unprepared to meet his Almighty Maker" and petitions for a commutation.²¹ Denis Sullivan, a lad of 17 recently arrived from Ireland, lay in Cornwall Gaol sentenced to death for horse stealing, but is pardoned on condition of banishing himself for life—indeed John Beverley Robinson, when the question was raised during the Willis controversy, was able to say that in his time in office, going back to 1812, there had been no executions for simple horse stealing.²² Philip Matheson, in the Johnstown District Gaol at Brockville sentenced to death for the same offence, also found mercy.²³

The escape of prisoners from the district gaols was very common, just as it has been 100 years later in this Province—to the indignation of law-abiding citizens.

The pillory was still in common use, and whipping was an ordinary punishment for theft not punishable with death.

Riding on a rail a man who is *persona non grata* to his neighbours, the courts refused to look upon as a mere bit of fun; the perpetrators were imprisoned for a considerable time and found no mercy.

¹⁹The letter is dated Hamilton, 26th October, 1821, Can. Archives Sundries, U.C., 1821. Several writers have been misled by want of caution in distinguishing the two Hamiltons.

²⁰It is one of my earliest recollections seeing the crowd of people around Cobourg Gaol at the "Court House" (formerly Amherst village) on the hill at the north of the town to witness the execution of Dr. King for the murder of his wife by arsenical poisoning. The trees giving on the gaol yard were crowded with men. This was the first (and only) execution at Cobourg.

The Indian was possibly of the Mississaugua Band of the Bay of Quinte who a few years later were settled in the Township of Alnwick—Chippewas they are sometimes called—or he may have been one of the "Rice Lake Band," what is now the Hiawatha Band on the north shore of Rice Lake.

²¹Letter, April 3, 1822.

²²Petition, September 6, 1822; see papers printed by order of the (Imperial) House of Commons relating to the removal of Mr. Justice Willis.

²³Petition, September 9, 1822.

Illegal celebration of marriage got many ministers and elders into trouble; the Church of England was tenacious of its valuable privileges.

The claim recently advanced that the Indians on the Grand River Reserve were allies and not subjects of the King makes its appearance and is disposed of adversely to the Indians.²⁴

Leaving the criminal law, we find many reminders of the War of 1812.

Mary Livingston, of the District of Niagara, is the widow of Peter Lee, who was a private soldier in the Coloured Corps raised by Captain Robert Ranney. He was injured in the war and died of the injury. She asks for a pension and is granted it.²⁵

Richard Pierpont, "a man of colour, a native of Africa and an inhabitant of the Province since the year 1780," petitions Sir Peregrine Maitland, setting out that he was a native of Bondon in Africa; at the age of 16 he was made a prisoner and sold as a slave; sent to America and sold to a British Officer, he fought through the Revolutionary Wars on the side of the Crown in Butler's Rangers, and also fought through the War of 1812 in the Coloured Corps raised at Niagara. He is old and poor and asks relief by being furnished means to go to England and thence to a settlement near the Gambia or the Senegal Rivers, from which he could return to Bondon, or "in any manner Your Excellency may be graciously pleased to order." It does not appear what disposition was made of this petition, but as "Captain Dick" is vouched for by Adjutant-General Coffin, it may be taken for granted that he obtained relief.²⁶

Certain Indian land on the Grand River had been leased for a long term to Benajah Mallory, Member of the House of Assembly for Oxford and Middlesex in the Fifth Parliament, 1808-1812. Mallory proved himself a traitor and joined the enemy in the War of 1812. His land was forfeited and, after inquest found, was sold to Mr. Sheldon. But it was claimed by William Johnson Kerr for the heirs of Elizabeth Kerr, wife of Dr. Kerr and daughter of Molly Brant (William Johnson Kerr himself married Elizabeth, daughter of Joseph Brant). Augustus Jones, the Surveyor who married an Indian woman, swore that the land had been given to Dr. Kerr's family by

²⁴See my judgment in the recent case, *Sero v. Gault* (1921) 50 Ontario Law Reports, 27; the opinion of John Beverley Robinson, Attorney General of Upper Canada cited therein; also the case of *The King v. Esther Phelps* (1823), Taylor's K.B. Report, U.C. 47, and the argument of Henry John Boulton, Solicitor-General for Upper Canada, afterwards Chief Justice of Newfoundland, at pp. 53, 54.

²⁵See petition and endorsement, March 1, 1822.

²⁶Petition and endorsement, July 21, 1821.

the Six Nation Indians in 1795 or 1796 agreeable to the wishes of Captain Joseph Brant and the other Indian Chiefs, and William K. Smith corroborates Jones—a whole aboriginal romance involving Sir William Johnson's morganatic marriage, the wonderful Miss Molly and her charming daughters, the grant to the Indians by Sir Frederick Haldimand, their generosity, the war, the treason, the forfeiture.²⁷

The unhappy results of mingling with the whites are illustrated by the report of William Macaulay to Major Hillier, the Governor's Secretary, from Cobourg, November 25, 1822, telling of the communication of small-pox by a family of immigrants at Port Hope to the Indians who inhabit in the vicinity of Rice Lake, "and though Dr. Gilchrist has, with great humanity, vaccinated some . . . it is to be feared that the contagion will spread." Spread it did and decimated the unfortunate tribe.²⁸

²⁷March, May and August, 1822.

²⁸Dr. Gilchrist was Dr. John Gilchrist, one of a family of physicians familiarly and affectionately known by their Christian name. He was "Dr. John," born at Bedford, N.H., he was educated at New Haven, Connecticut, and secured his diploma from Yale University. He was the first to receive a certificate of qualification to practise Physic Midwifery and Surgery from the Upper Canada Medical Board created under the Act (1818), 5 George III, c. 13 (U.C.), being composed of Drs. James Macaulay, Christopher Widmer, William Lyons, Grant Powell and William Warren Baldwin.

The four first named held their first meeting at York, January 4, 1819, and examined two candidates. "Mr. John Gilchrist, of the Township of Hamilton, in the district of New Castle, appeared and being examined and found duly qualified to practise Physic Midwifery and Surgery; he received a certificate to that effect accordingly.

Mr. John S. Thomas of Markham, in the Home District, likewise appeared and on examination was found totally unqualified to practise in either branch."

The Board received for every certificate the sum of £3 10s. (\$14) from the successful candidate, who then took the certificate to the Private Secretary of the Lieutenant-Governor, and upon paying the Secretary 20s. (\$4) he received a licence to practise.

Dr. "John" practised near Cobourg; in 1822 he became surgeon to the 1st Northumberland Regiment of Militia. Later he removed to Otonabee and founded the village of Keene, where he erected saw and grist mills—in 1831 he went back to practice in Cobourg; removing to Peterborough he became member of the Legislative Assembly in the new Province of Canada. He was arrested as a rebel in 1838 but released. In 1849 he removed to Port Hope, where he died in 1859.

Of the other Gilchrists, "Dr. Sam" and "Dr. Matthew" of New Castle District received their certificate, January 1824; and James Eikin Gilchrist of New Castle, "Dr. Jim", his January, 1832. I knew "Dr. Jim" in Cobourg half a century ago, still practising; he had been educated at Dartmouth College, N.H., from which he received the degree of M.D. "Dr. Hiram" also received the degree of M.D. from Dartmouth; he failed before the Board, April, 1834, in Latin. All these, except Matthew, were brothers.

Duelling was not extinct—Anthony Marshall, J.P., of Kingston, complains to Maitland of Captain Raines, commanding a troop of Militia Cavalry (Dragoons), abusing him for certain acts done as a magistrate, and sending him a challenge by Mr. Innes, Wednesday, October 24, 1822. Marshall at once referred him to Mr. Robert Stanton. The next day there was a notice put up in the Post Office signed "Fras. Raines," declaring Mr. Marshall to be "no Gentleman and a Coward," also on two posts of the Marketplace "a creamer" posted:

"Kingston, 23 Oct., 1822.

"I do hereby declare Mr. Marshall, of Kingston, Surgeon, etc., to be no Gentleman and a Coward.

"Fras. Raines."²⁹

The feud between Lord Selkirk and the North-Western Company had left its traces.

The District of Ottawa, recently formed by the Act (1816), 56 George III, c. 2, of the Counties of Prescott and Russell, which were detached from the Eastern District, had required a Sheriff, and Alexander Macdonell wished to be appointed. He was unsuccessful in his application because he was under indictment in connection with the Selkirk-N.W. Co. troubles. He applied, without success, to be tried; and finally the indictments (in Lower Canada) were *nolle prosequied*. Simon McGillivray, now at Port Talbot, writes Mayor Hillier, Maitland's Secretary, on behalf of Macdonell. On his return to Montreal McGillivray writes again, October 12, 1822, with certificates of quashing indictments against Macdonell. In this letter are certain statements worth copying in full. McGillivray says that, on looking over the indictments and the persons against whom they were found, "I am forcibly reminded of a conversation which I had, or rather a series of remarks to which I listened, on a certain occasion five years ago from a magistrate who had been much occupied in taking the affidavits of Lord Selkirk's witnesses and whose professional caution was at the time rather diminished by a social glass. He began

²⁹It appears that Lieutenant Innes appeared before Pringle, J.P., and Marshall, J.P., and that Marshall forgot himself for a moment and said that Raines "told a story"—he denies that he used the shorter and uglier word "lied." Raines called him rascal, villain, coward and other like terms, and the same day sent him two challenges through Innes.

Is "creamer" intended for "screamer"? The lexicographers do not know the word.

by paying me compliments, the tendency of which I was at a loss to understand until at last he said: 'I am sorry for your fate, for with all this you will certainly be hanged.' And on my requesting an explanation he proceeded: 'Why, man, you have to deal with a man of the most formidable controversial powers of this or perhaps any other age, and his interest requires that you should be disposed of. By controversial powers, Sir'—my friend was fond of definitions—'I mean the power of proving anything a man chooses, and I believe Lord S.'s powers in that way to be so great that he might even succeed in burning a Cardinal. Perhaps, Sir, you do not know for what cause a Cardinal may be burnt. A Cardinal may be burnt for either of two crimes, Heresy or Adultery. Now as heresy is a sort of hypothetical crime of which the proof is rather difficult, and of which other Cardinals are to be the Judges, it is not likely that a Cardinal should ever be burnt for heresy—but adultery is a matter that may be proved by direct testimony, and to convict a Cardinal it requires seventy-two eye-witnesses of the fact. Now, Sir, my Lord Selkirk shall turn you out seventy-five.'"

The New England theologian, Noah Worcester, who had been a soldier in his youth and who took an active part in the Massachusetts Peace Society founded after the close of the War of 1812, and himself wrote practically all the contents of the quarterly, "The Friend of Peace" (1819-1828), wrote, September 11, 1821, from Brighton, Mass. (where he had settled in 1813), to Sir Peregrine Maitland inviting his attention to the objects of his Society "to prevent another war between Great Britain and the United States."

The navigation of Rice Lake and the River Trent, "85 miles from the head of Rice Lake to the Bay of Quinté," was urged upon the Governor as of great importance.³⁰

In legal circles there was still an occasional echo of the unsuccessful attempt of Christopher Alexander Hagerman in 1815 to obtain the distinction of King's Counsel. Sir Frederick Phipse Robinson had passed his appointment and it was duly gazetted; but before the patent could issue, Robinson had lost the position of Administrator of the Government and Gore had returned as Lieutenant-Governor. Gore submitted the matter to the Judges, they reported against the patent and no King's Counsel were in fact appointed until 1838.³¹ In 1822 Mr. Justice Campbell, one of the Judges who reported against the project, writing to Major Hillier recommending M^r. (afterwards

³⁰Letter from Charles Hayes, October 31, 1821.

³¹See my article, "The First and Futile Attempt to Create a King's Counsel in Upper Canada," in 40 *Canada Law Times* (February, 1920), pp. 92, *sqq*.

Chief Justice, Sir) James Buchanan Macaulay as Crown Prosecutor on the Western Circuit, after saying that such appointments are not made by seniority at the Bar, adds: "In my having suggested this nomination, I hope, Sir, you will do me the justice to believe that I had not the most distant intention of anything that could possibly militate against any claim Mr. Hagerman may have to the honorary distinction of a silk gown."³²

The house temporarily provided for the County of King's Bench at York was wholly unfit, and Samuel Ridout, the Sheriff, wanted a warrant to pay two years' rent at £40 a year (Oct. 20, 1819-Oct. 23, 1821).

The Government House, on lots 23 and 26, south side of Russell Square, built of wood, was insured in the Phoenix Insurance Company of London, England, for £3,000, currency (\$12,000) for a premium of £37 10s. and 5s. for the policy, April 1, 1822.

John Beverley Robinson, in London, April 22, 1822, writes Hillier that "Mr. Gourlay has just published his Statistics in three volumes full, I am told (I shall get it to-day), of his old grievances;" and of a surety he had not been much misinformed.

Major McNabb, Sergeant-at-Arms, June 7, 1822, nominated his son, Allan Napier McNabb, as Deputy Sergeant-at-Arms. Did either foresee that the young man of 24 was to become a baronet and Prime Minister of Canada?

Anne Powell, the self-willed but talented daughter of the Chief Justice, met a watery grave off the Head of Kinsale when the *Albion* from New York was wrecked, April 22, 1822—the second of her family to sink beneath the waves, for her brother Jeremiah had perished at sea nearly fourteen years before.

The will-o'-the-wisp of Perpetual Motion was not unknown in our Province. John Thomas of "Gananock, upper candy," writes to the Governor in March, 1822: "On the fifth of march i praid earnestly to GoD to revel the perpetul motion to me if it was consistent to his will and that night I drempt that i saw two machines that went perpetully i saw a whele that went perpetully it was three feet in sercumference and twenty three peeces of steel fasned in the rim of the whele all of an epull Distence a part and a pece of tode stone three inches from the rim of the whele wich a tracted the steels and thare ware copper slides that shed back and furred over the steels on the whele went round when a steel got in range with the tode stone the

³²Campbell's letter is dated May 28, 1822.

Campbell writes July 8, 1822, that Hagerman had called on him and said he was to accompany the Judge as Counsel for the Crown.

slide stiped over the steel wich brok the attraction be twen the todestone and that steel and a tracted the next as the whele went roun and keep the whele continullly wherlling i shall not mention the other matter untill i no your mind a bout this." The Secretary endorses this lucubration, "Mr. John Thomas has discovered (or dreamt he had) the perpetual motion, March 5, 1822."³³

"Quid est quod fuit? ipsum quod futurum est. Quid est quod factum est? ipsum quod faciendum est. Nihil sub sole novum, nec valet quisque dicere: Ecce hoc recens est; jam enim praecessit in saeculis, quae fuerunt ante nos."

The words of the Preacher came into my mind when, intending to prepare this address, I made an examination of the "Sundries, U.C.", in the Dominion Archives.

The very first paper which caught my eye was a letter from my own county, Northumberland. John Smith, of Lot No. 3 in the 8th Concession of Cramahe, writes, October 29, 1822, to Major Hillier:

"As the lumbermen are committing sad depredations in this neighbourhood by plundering indiscriminately the lands of the Crown and those of private individuals to the ruin of the lands and great detriment of the country," he asks that this practice be stopped. Major Balfour of Percy said that he had no authority to stop the depredations. Smith wishes "any communication for me to be addressed to Major Bafour . . . to prevent suspicion and avoid the revenge of these robbers . . . on some of the lots there is lumber enough now cut to pay for 40 years' lease. . . ."

Not receiving any reply—apparently the Crown Lands Department of the day was supine—Smith writes again, November 23, 1822. He said that he had written, October 29, concerning the depredations

³³The idea is clear enough: Thomas thought that the interposition of a copper screen would prevent the action of the loadstone on the steel—the steel approaching the stationary loadstone, being bare, would be attracted by it; but as soon as the steel was past the loadstone, the copper screen or slide slipped over the steel and it was no longer attracted by the loadstone. This is almost identical with the scheme in the *Ency. Brit.*, vol. 21, p. 182; the fallacy is obvious.

The dreamer writes "todestone" but, of course, he means "lodestone;" he once writes "whele" as "whete"; "stiped" is 'slipped'.

When I began the practice of law an inventor called on me time and again with a scheme for perpetual motion: I refused to look at it or consider it (I had received my degree of B.Sc. some years before). I told him to bring me a working model and I would give him \$100. Over and over again he brought descriptions and sometimes part of a machine which "would work" or was "going to work"; but I always refused to look at anything that did not actually work. I never got one, and till the day of his death Moffat felt hardly toward me because I would not pay him for something he was sure would work but which never did.

and enclosed a copy of the letter; he had sent the former letter by private conveyance and was afraid that it had miscarried. He adds that the amount of depredation in this year is without parallel, principally by Americans (*Nihil sub sole novum*) who boasted that they would leave the land not worth a farthing for 40 years to come.³⁴

I pass over the interesting attempt of the Lieutenant-Governor to act as Chancellor in an "Ordinary" or "Common Law" Court of Chancery, to repeal a patent of land granted in Lanark to Samuel Swan in error—this is too technical to be dealt with here.

My old town of Cobourg was, August 2, 1821, granted a "Fair."³⁵ Subscriptions were asked, November 8, 1821, by a committee headed by Joseph Hume for a monument to the Duke of Kent.

The English Methodists were withdrawing from Upper Canada (except the Garrison at Kingston). They did not wish to carry on a warfare with the American branch as there was no evidence of interference in political questions by the ministers of the Methodist-Episcopal Church and the prejudice against them was unfounded.

The Reverend John Barclay, clergyman of the Church of Scotland at Kingston, wanted an allowance, and asked Hillier in what part of the "Scotch Established Church" in Kingston the Governor's seat be placed, stating that in Quebec it was on the front of the gallery opposite the pulpit.—*Estote prudentes sicut serpentes et simplices sicut columbae*. His *confrère*, the Reverend John McLaurin, Minister of Lochiel, U.C., who went there in 1820 and was paid £60 a year "most in kind," had a congregation of 1,200 souls able to attend church from the townships of Lochiel, Kenyon, Hawkesbury and Caledonia—he also thought that the Scottish Clergy should be provided for. There were only four of the Established Church—

³⁴Lot 3, Con. 8, Cramahe, is now in the Township of Brighton—there is a mill privilege on the lot; the village of Codrington is on part of it.

Henry John Boulton, the Solicitor-General, wrote Hillier from York, May 23, 1822, stating that the constable had been prevented from arresting two men stealing timber at the River Credit and he asked for a military force. Andrew Wharfe, the Deputy Collector, was instructed by Boulton to seize two vessels at the mouth of the Credit River loaded with staves for export: he met with forcible opposition.

³⁵The patent was issued to "John Spencer and his successors in office as sheriff;" it was of a public fair "with all the privileges, customs, usages, court of pie powder," incident to fairs and the laws of fairs—the fair to be held "in the town of Cobourg in the township of Hamilton in the District of Newcastle." The grant is endorsed with the fiat of John Beverly Robinson, Attorney-General, and is dated August 2, 1821. This is the first notice of Cobourg which I have seen—the town had been called "Hamilton."

Port Hope, seven miles west, got a fair the same day with the same provisions, the grantee being John Hutchinson.

himself, Mr. Barclay and Messrs. MacKenzie at Williamstown and Leitch at Cornwall. There were some 18 other Presbyterian clergymen in the Province—some of the Secession Body in Scotland, some of the Synod of Ulster in Ireland, some of the Independents in England, and two or three or four from the United States—he thinks that “the Methodist and Presbyterian clergymen who reside in this Province from the United States must operate strongly in alienating the minds and affections of His Majesty’s loyal subjects. “I have been told by a respectable English Methodist preacher that a preacher from the United States harangued a large audience on a Sunday lately on the probability of the Provinces falling to the States in the event of war with Great Britain, and the beneficial effects which would flow to the inhabitants of this Province from such an event. Such things call strongly for the interference of the Legislature.” He did not ask for any governmental provision for *them*.

On the other hand, the Reverend S. J. Mountain of Cornwall complains, October 7, 1822, of the trustees of the District School dismissing Mr. James to appoint “a Presbyterian clergyman from Scotland on his arrival in this country”, and he fears “injurious influence upon the principles of the children of the Church of England here.”

I close this discursive and already too long paper by a reference to one of the most picturesque of our Canadian immigrants. Lord Dalhousie, October 4, 1822, writes to Maitland introducing “Mr. McNab, a gentleman of great respectability from the Highlands of Scotland, who proposes to make a hasty tour in the Upper Province and desires to make his bow to you.”

I shall succeed in my object if I induce you and others to consult this fascinating collection of documents.

THE UNIVERSITY MONTHLY

APRIL, 1916

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THE UNIVERSITY OF TORONTO
ALUMNI ASSOCIATION

AN INTERESTING HISTORICAL PARALLEL

“**T**HE thing that hath been, it is that which shall be; and that which is done is that which shall be done: and there is no new thing under the sun, ”says “the Preacher, the Son of David, King in Jerusalem.”

Colonel Turner, K.H., who died in Toronto in 1852, left behind him a manuscript volume, in his own beautiful and clear handwriting, entitled “A Journal of my Service”, which gives his experience in the Peninsular War and afterwards.

Ensign in 1806, Lieutenant the following year, he took part in 1807-8 in Hood's capture of Madeira. He arrived in Portugal in 1809, took part in the battles of Busaco, Fuentes d'Onor, Salamanca, Pyrenees, he siege of Ciudad Roderigo, Burgos and Pamphlona. He was wounded at Nivelle and sent home early in 1814 with Captain's rank; in 1832, a K.H.; in 1830 Colonel and appointed Inspecting Field Officer of Militia in New Brunswick. Returning to England in 1836, he was during our little Rebellion (January 1838) sent out to Canada “on particular service” and placed in command of the Eastern District of Upper Canada; he returned to England in 1843, but in 1845 he sold out and came to Upper Canada as a settler. He bought a farm near Toronto, on St. Clair Street, west of Dufferin Street (afterwards the Rossin House Farm) and built a commodious residence in which he lived till his death.

In his manuscript occurs the following account of his part in the siege of Ciudad Rodrigo:

"On the 8th January (1812) we invested Ciudad Rodrigo, and on the 19th at night we took it by storm. We suffered little during the siege. In the storm we had only an officer and three men wounded, owing to the good disposition made by Lieut.-Colonel O'Toole, who conducted one of the columns of attack of the Third Division, which was composed of the Light Company of the 83rd Regiment and of our battalion. Colonel O'Toole had frequently observed during the siege the French soldiers come down into the ditch and carry up cabbages without any apparent difficulty; he therefore made this his point of attack. A sergeant of the 83rd Light Company was the first man up, next O'Toole himself. The attention of the enemy's sentry near this place was by the heavy firing at the breaches not thinking of an attack so near. He was instantly put to death, and the column all formed without being observed, and advanced to the market place, where the enemy surrendered, the town having been entered in all directions."

Every schoolboy—at least Macaulay's schoolboy—knows the story of Cyrus as told by Herodotus in the most fascinating book of all his fascinating history—Clio, or the First Book. He had his experience, wide and varied, of sieges, and none of them more interesting than that of the beautiful and luxurious capital of Lydia.

The story runs thus (the translation is as nearly literal as the different idioms of Greek and English permit; it claims no other merit):

(84) "This is the way Sardis was taken. When the fourteenth day of the siege of Croesus arrived, Cyrus sending horsemen announced that he would give a reward to the first to mount the wall. After this an unsuccessful assault was made by the army; and when all the others had ceased their efforts, a Mardian by the name of Huroiades going forward, attacked at a part of the acropolis where no sentry had been placed—for there was no fear entertained that it might be taken at this point, as there the rock was precipitous and im-

pregnable. Meles, the former King of Sardis, had not here carried around the lion to which his concubine had given birth. The Telmessians had declared that if the lion were carried around the wall, Sardis could never be taken. Meles, carrying it around the remainder of the wall, considered this precipitous part as impregnable; it is that part of the city facing Mount Tmolus.

This Mardian Huroiades had on the previous day seen a Lydian descend at that part of the acropolis after a helmet which had rolled down, and carry it back; he thought over this circumstance, cast it over in his mind. Then he himself climbed up there and other Persians after him. When a large number had got together, Sardis was taken and the whole city sacked."

Polybius tells of the same city being taken in almost the same way by Lagoras, one of the generals of Antiochus the Great, more than three hundred years later. That Sardis was then taken is certain, but one may be permitted to doubt the method alleged—lightning does not strike twice in the same place, though it strikes in the same way at different places. However that may be, we see that the acumen of the Mardian, Son of the Beehive, in 554 B.C., was matched by that of the Irish O'Toole in 1812 A.D.—and there in no new thing under the sun.

WILLIAM RENWICK RIDDELL.

BOOK NOTICES

The National Domain in Canada and its Proper Conservation, by FRANK D. ADAMS, PH.D., D.Sc. pp. 48. Commission of Conservation, Ottawa, 1915.

The underlying problem suggested by Dr. Frank D. Adams' presidential address to the Royal Society of Canada, now published by the Commission of Conservation, is that of the continual conflict between the temporary interests of individuals and the permanent welfare of the nation. Again and again, as one reads, the conclusion is borne in upon one that, just as the shortsighted conduct of the early settlers in dealing with the natural resources of the country has greatly impoverished the Canada of to-day, so the equally myopic attitude of the average Canadian of to-day is impoverishing the Canada of the future with no corresponding advantage in the present. Even Herbert Spencer would have been convinced of the urgent necessity for governmental action in this sphere if he could have traced the history of the destruction of the natural resources of Canada—resources of the farm, the forest, the mines and the fisheries. Yet, "though much is taken, much abides", and with reasonable regulation of primary production—improved and more economic methods in agriculture and mining, reforestation of such districts as the Trent valley—Canada may still hope, while using, to conserve her remaining natural resources to be a blessing to posterity. Probably the movement for conservation of the assets of the country will be stimulated when we realise the enormous addition made to its liabilities through the present war. Dr. Adams' address is a useful and convincing, though not particularly

TO LESBIA

BY

CHIEF JUSTICE SIR GLENHOLME FALCONBRIDGE

MR. JUSTICE RIDDELL

W. P.

PRINCIPAL HUTTON



TO LESBIA

CATULLUS V.

Vivamus, mea Lesbia, atque amemus,
Rumoresque senum severiorum
Omnes unius aestimemus assis.
Soles occidere et redire possunt:
Nobis cum semel occidit brevis lux,
Nox est perpetua una dormienda.
Da mi basia mille, deinde centum,
Dein mille altera, dein secunda centum,
Deinde usque altera mille, deinde centum.
Dein, cum milia multa fecerimus,
Conturbabimus illa, ne sciamus,
Aut nequis malus invidere possit,
Cum tantum sciet esse basiorum.

I.

Lesbia, let us live and love,
We'll old fogies' mumblings prove
Worth not half a cast-off glove;
Suns may rise, may set the sun,
But when once our day is done
Sleep eternal has begun.
Thousand kisses now give me—
Then a hundred—and then we
Will another thousand share,
Then a second hundred—there—
Now another thousand, then
Give me kisses ten times ten.
When a million we've enjoyed
Let the record be destroyed
Lest we or some satirist
Shall find out how oft we've kissed.

GLENHOLME FALCONBRIDGE

II.

Let us love, Lesbia mine, as our life's course we run
 And scorn the old wives' maxims deep,
 For full often will rise the oft setting sun,
 But when our brief light's quenched, then our day is done
 And death is one long, long sleep.

Give me kisses a thousand, a hundred more,
 A thousand, a hundred again,
 Many hundreds and thousands—forget we the score,
 Lest some envious wretch should grudge us them sore,
 Of our kisses the tale should he ken.

WILLIAM RENWICK RIDDELL

III.

Live we our life, and let it be
 A life of love for you and me;
 Nor care a fig for all the chatter
 Of prim old people who don't matter.
 Suns that set will rise more bright:
 But when fades our little light
 We must sleep through endless night.

Give me a thousand kisses! then five score,
 Another thousand, then a hundred more,
 Then straight a thousand, and again five score!
 Then when our kisses many thousands grow,
 We'll spoil the counting, so we may not know,
 Or lest some evil eye should blight our blessings
 By knowing the full tale of our caressings.

W. P.

IV.

Love me, Lesbia; life is naught without it:
 Sour old Puritans scowl, and scold and scout it:
 Just one penny for all their thoughts about it.

Yon sun sinks, but another sun's to follow:
 Our sun, once it set, sets to joy and sorrow
 In perpetual night without a morrow.

Come, then; kisses a dozen I implore thee:
 Then more kisses and more and more and more; *see*,—
 When their number is mounting by the score, *we*

Just lose count of it: ignorance our bliss is:
 So that somebody's eye of evil misses
 Us whom love has made millionaires of kisses.

MAURICE HUTTON

L'ENVOI.

What's this? hendecasyllables to Tessa!
 Not Chief—Justice—and stuffy old Professor—?
 Well! well! only to think of that! God bless her!

M. H.

Perils of the Deep in Olden Times

By

The Honourable William Renwick Riddell, L.L.D., Etc.



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Perils of the Deep in Olden Times

By

The Honourable William Renwick Riddell, L.L.D., Etc.

WHEN a Canadian sets his foot upon one of the splendid Canadian Trans-atlantic Steamships at Montreal, Halifax or St. John, he has no more sense of danger than if he were entering the King Edward Hotel or the Chateau Laurier. There is as little danger now in crossing the Atlantic as in driving along a country road: the wholly unexpected may happen in one as in the other, but that which is wholly unexpected does not enter into any one's calculations. One may be as confident of arriving at Liverpool safely by a Cunard or White Star steamship as at Montreal by a Canadian National-Grand Trunk train. This assurance of safety is a thing of modern growth: in olden times, a Canadian took his life in his hands when he ventured to cross the Sea. In this article, it is proposed to give some examples of that deadly peril as illustrated by incidents in the life of one man in Canada, William Dummer Powell, the First Judge at Detroit and afterwards Chief Justice of Upper Canada.

Powell, born in Boston, educated in England and on the Continent, came from London to Canada in 1779 to practice law, leaving his wife and three boys behind in England. When he had succeeded in making a practice in Montreal he sent for his wife and family. On her way over, the ship upon which Mrs. Powell embarked was captured by an American Privateer, and taken to Boston, then (1780) in the possession of the Revolutionaries. Mrs. Powell and her small children were set free and sent on to the husband and father at Montreal through the influence of some of his relatives in Boston who had taken the side of the rebels. It would not be reasonable to consider this incident as illustrating perils of the deep in olden times, because it was but the other day

Editor's Note.

The Honourable Mr. Justice Riddell has been kind enough to favour Canadian National Railways Magazine with the following interesting article which strikingly reveals the peril of travel by sea a few generations ago. Travel by rail and steamer is now comparatively safe, and, in drawing attention to the risks that formerly existed, in respect to sea journeys, the writer pays a well deserved compliment to the Canadian National Railways' steamship connections, which have so well developed the science of ocean transport as to bring about the contrast so well depicted in the article.

maintained for the Germans to slaughter innocent travellers.

Pierre du Calvet

Almost the first client that Powell had in Montreal was Pierre du Calvet. He was a Huguenot Frenchman who had come to Canada while it was still New France and had become a person of some note. On the cession of Canada in 1763, he professed great attachment and loyalty to the British

Crown; but when Montreal was taken by the Americans in 1775, he entered into relations with the conquerors. These relations he always contended were purely business relations, the legitimate sale to them of goods in his regular line as a merchant, but the evidence now available is overwhelming that he was a traitor.

Sir Frederick Haldimand, the Governor of the Province of Quebec, imprisoned him in 1780, first on H.M. Ship "Cancaux", in Quebec Harbour; then in the Military Prison, and later in the Convent of Recollet Monks at Quebec. Du Calvet applied for his release under a writ of Habeas Corpus, but it was held by the Court that no such relief could be given him under the French-Canadian law then in force. The fact that Du Calvet himself had been an ardent advocate of the change in 1774 from the English Civil Law in which such relief would be granted, to the French law in which it could not, was considered a great joke in those days, though it may be doubted if Du Calvet saw the point of it.

When the Colonies were granted their independence in 1783, there was no more need to keep du Calvet in custody, and he was released by Haldimand. Du Calvet went to England and waited until Haldimand was recalled, and then brought an action in the Court of King's Bench against him for false imprisonment. Du Calvet came to Canada to procure evidence

(parties to an action could not then be witnesses) and went to New York on his way home. He embarked, March 15, 1786, upon an old ship which had been taken from the Spaniards and re-named the "Sherburne". A violent storm sprang up "such as never remembered before in the memory of man" as the contemporary report says—but then nearly all great storms are described in similar language. Neither ship, passengers or crew were ever seen or heard of again—*Spurlos Versenkt*.

Jeremiah Powell

Jeremiah Powell was Chief Justice Powell's fourth son; born in Montreal, educated in Detroit and England, he was sent to New York to learn the art of commerce in a counting house there. Becoming tired of the monotony (he was only twenty years old) he went to Haiti on a trading venture. Then he sold to the negro chief Dessaline, (shortly afterwards Emperor of Haiti) some military ornaments as gold. They had been invoiced as gold to Jeremiah and he acted in good faith, but they turned out to be nothing but brass gilt, and Dessalines wrote Powell that he would see him about them. Powell understood that he was in imminent danger of death, and he joined Miranda, a South American, then leading an expedition to set Venezuela free from Spanish dominion, who had put in at the Haytian port—Miranda gave him a Major's commission. Unfortunately the Spanish authorities were awake and captured the ship in which Jeremiah was and took him and others to Porto Cavallo. Some were beheaded, but Jeremiah escaped with a ten years' sentence of virtual slavery in the prison of Omoa in Nicaragua. The news coming to this city, then called York, the Judge went to England and at length to Spain, and procured his son's pardon and release (1807). The boy came home but soon tired of the little Provincial capital, and in March, 1808, left for Curacao, an Island in the Carribean Sea, which Britain held from 1806 till 1814. He had been promised a lucrative Government post there, but travelling by way of Halifax (where he met Aaron Burr) and Barbados, he arrived late, and found the post given to another: he then set sail for England by the ship "Alexander" to see Miranda. Neither ship, passengers or crew was ever heard of again, and it is believed that the "Alexander" foundered with all on board.

Anne Powell

Anne Powell was the second daughter of William Dummer Powell; her elder sister bore the same name, but died in in-

fancy. Born in Montreal in 1787, she accompanied her father in 1789 from Montreal to Detroit, where he had been appointed First Judge by Lord Dorchester. She grew up a handsome and clever woman, and had a good education: she was rather capricious, and very self-willed. Unmarried at 35 she had long been eprise of John Beverley Robinson, the handsomest man of his day in Little York; it had been rather expected that they would marry each other, but Robinson chose an English bride. In 1822, she attracted considerable unfavourable comment by her evident liking for him; it should be said, however, that not even the censorious society of York suggested anything more than an unwise flirtation on her part and her own family acquitted Robinson of anything but a gallant speech, now and then.

Anne resented the gossip and made up her mind to go to England (where her father was) with Mr. and Mrs. Robinson. She eluded her people, took a sleigh to Kingston, crossed over, and joined the Robinsons at Albany. She went with them to New York, but did not commit the impropriety of taking the same ship for England; she took the packet "Albion" (Captain Williams) which had the great tonnage for those days of 500 tons. All went well for a time, but when within a few day's sail of Ireland the "Albion" encountered heavy weather and was in great distress for several days. Anne encouraged the men at the pumps—she is the heroine of the Sailor Song "Polly Powell was her name"—She even took her turn at the pumps with the sailors. All was in vain; the unfortunate ship was dashed against the Head of Kinsale on the South Coast of Ireland, and Anne was drowned with some of the crew. She was last seen standing in the stern sheets with a purse in her hand, apparently offering it as a reward for rescue, but a tremendous wave struck her and carried her overboard to her death. Her dead body was picked up and reverently buried in the churchyard of Templetrine Parish Church, where it awaits the last trump. A brooch found on her breast is still kept by members of her family in Toronto, and her sorrowing father placed a monument over her grave and a marble tablet to her memory in Templetrine Church, where they are still to be seen. The beautiful, sprightly, bright, if also self-willed, Anne was the last of William Drummer Powell's circle to be the victim of the angry Atlantic. Hundreds of cases such as these are known and there have been like tragedies on our inland waters.

Now, what a change!





London to Toronto in 1836

By

The Honourable William Renwick Riddell, LL.D., Etc.



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April, 1922

London to Toronto in 1836

By the Honourable William Renwick Riddell,
LL.D., F.R.S.C. &c.

IN 1922, London to Toronto in less than a week; but in 1836 there was no such speed.

Anna Brownell Murphy born in Dublin in 1794 was the daughter of an Irish miniature painter of some note, Denis Brownell Murphy, and his English wife — clever, precocious, neurotic from infancy, she gave promise of the literary talents which she employed so well in after life. In 1825, she married Robert Sympson Jameson, an Equity barrister of ability and promise—the marriage (a marriage only in name) was a failure; and Jameson went to the West Indies where he had an Imperial appointment while Mrs. Jameson visited France, Italy and Germany. Jameson was appointed Attorney-General of Upper Canada and came to this Province in 1833. He was Attorney-General of Upper Canada 1833-1837; Vice-Chancellor 1837-1850; Speaker of the Legislative Council of Canada 1841-1843; he was not Speaker of the House of Upper Canada or Chancellor as Mr. J. Ross Robertson has it in "Landmarks of Toronto" Vol. 1, pp. 492, 493; he was not "Speaker and Attorney-General of Ontario" as the D.N.B. Vol. XXIX, p. 230, has it—nor was he ever "Chancellor and Speaker of the House of Assembly" as is stated in Mrs. Stewart Erskine's work on "Anne Jameson" (1915) at p. 143. His wife in her letters always but wrongly called him Chancellor.

In 1836, he asked his wife to join him in Toronto; she was at the time living on most familiar terms with Ottilie von Goethe, the daughter-in-law of the celebrated poet and scientist — she agreed to go to what her husband painted as an Elysium but of the beatitude of which she felt more than doubtful.

Embarking at Portsmouth, Friday evening, October 7, her ship attempted to proceed down the Channel next morning; but it was driven back by a gale and anchored

on Monday morning at St. Helen's, Isle of Wight. On Wednesday, the Captain resolved to sail; but fortunately he was overruled by the pilot—there was a terrible gale that evening, and many ships foundered, one within a few miles of St. Helen's. But the gale passed and before the end of the month, she was in New York.

She left New York, December 6, by the night steamer for Albany, there being no day boat. The steamer carried 400 passengers: Mrs. Jameson stayed on deck as long as she could "to escape the stifling air of the ladies' cabin where 89 women were stuffed pell-mell, some in berths, some on the ground, on chairs and with children sprawling about." But finally, she threw herself on her berth and slept. In the morning, the river was a sheet of ice through which the steamboat with its iron prow smashed its way for a time; but a stop had to be called at 9 o'clock at Hudson, 114 miles from New York—it being feared that the boat would be frozen in at Albany.

The passengers and their luggage were tossed out unceremoniously: Mrs. Jameson joined a party in taking a carriage to Albany with a wagon for the luggage. They "jolted the 30 (really 28) miles in about 8 hours through a fine country, but wintry looking and thinly inhabited." At Albany, she fell in with Mr. Percival Ridout of Toronto, who took her under his protection for the rest of the voyage—"a most good natured and good looking young man," he "proved a most efficient cavalier." Albany to Utica, 90 miles (really 95) in 6 hours by railroad, eight carriages each containing 24 persons. From Utica, the usual way to travel to Upper Canada was by the Erie Canal either all the way to the Niagara River, or changing boats at Syracuse (55 miles west) to the Oswego Canal, thence to Oswego and then by steamboat to Kingston. But the Erie Canal was frozen and it was necessary to take a stage coach—"the

most extraordinary clumps, all looking mean-looking thing you can imagine, holding 2 persons 3 in a row" the best that could be said of them was that they suited the roads or what were called roads. The trip to Rochester, about 135 miles, took 36 hours—once they were "6 hours going 9 miles with 4 horses," and "often for hours through half burnt forests, the blackened stumps of enormous trees just seen above the snow; a dismal prospect." She did not sleep at Rochester, but hired a carriage and came on to Lewiston 40 miles (really nearer 70 miles) in 28 hours—crossed the Niagara in the dark and slept at Queenston. This was Sunday night, December 12, six days from New York.

Monday morning, two spring carts were procured for the travellers and their baggage and they reached Niagara just in time to catch the last boat for Toronto—had they missed this boat they would have had to travel by land round the head of the Lake "100 miles and two days' journey over

no. 10 roads, whereon I had the distance was but 35 miles. But the fare was as rough as she had often seen it at sea; she threw herself down quite exhausted, and slept till she was told the boat was in Toronto.

Her reception was not glowing. There was no one to meet her; Mr. Ridout took her to her husband's house at the corner of Front and Brock Streets, but that was "worse still; all looked cold, comfortless, the fires out or nearly so, a bedroom . . . half prepared for me on the unmade bed things . . . piled, the servants looked half surprised, half alarmed," and she says "I felt as miserable as possible—I put, however a good face on the matter and when Jameson returned he seemed at least glad to see me." The rest of the story is well known; the ill-mated couple separated the next year, never to see each other again—he to remain in Canada and die in Toronto, 1854, and she to return to Europe and survive until 1860.





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to do. We are, at this moment, in the midst of a great world crisis, in which, as a nation, we must play an important part. What shall it be? Into specific questions or national policy, it is inappropriate here to enter. There is, however, of necessity, a natural limit to national responsibility. In a great emergency, this Republic has rendered an immense service to civilization. It has been able to do so because it has in the past been true to itself, and has met its international obligations whenever they have arisen. It will, undoubtedly, do so in the future; but its ability to do it will depend upon the harmonious relations of our own inner life, as a nation, the prudence with which we conserve and control our national energies, and the union of mind and purpose on the part of our composite population, which contains citizens of many races, who could not comprehend our attempt to fix the boundaries of other countries, to determine their forms of government, or by force to settle their quarrels, often so imperfectly understood by us. If we are to demand, as we have a right to do, that every American citizen must have a single allegiance, and that to this country, then it must be the aims and interests of this country, and not the dis-

putes and aspirations of other countries, for which an American citizen must stand.

Nothing in our Constitution has opposed our participation in the war for the common defense and the enforcement of obedience to international law, which is also our law, when it was brutally violated and which it was the purpose of the enemy utterly to destroy. Nothing in our Constitution prevents our loyal defense of our co-belligerents in the war, in case of unjust assault; or the continuance of our great mission, as a nation, to establish in the world a reign of law, sustained by the support of all civilized peoples, in order to safeguard the rights of nations by principles of justice, under governments established by the consent of the governed. In pursuing these purposes, we may, at the same time, retain the national independence transmitted to us, and best fit ourselves to render the most effective service to mankind, whenever and wherever it may be our duty to render it. Let us then pledge ourselves anew to defend our great charter of law and liberty, in order that "government of the people, by the people and for the people shall not perish from the earth."

Democracy and Hereditary Legislators; The Canadian View

By William Renwick Riddell, LL. D., F. R. S. C., etc.

Justice of the Supreme Court of Ontario

Within the last few years an agitation has sprung up against knighthoods being given to Canadians. The first manifestation was against hereditary honors such as baronetcies, and when, in 1917, Mr. Joseph Flavelle of Toronto was made Sir Joseph Flavelle, Baronet, much dissatisfaction was expressed throughout the whole Dominion, perhaps most strongly in Ontario. This was not a new thing. It is true that when Sir John Beverley Robinson, Chief Justice of Upper Canada (now Ontario), became a baronet in 1854, Sir George Cartier, Sir John A. Macdonald's most trusted colleague, in 1868, and Sir Charles Tupper, another most capable colleague of Sir John's, in 1888, there was little public dissatisfaction expressed, but there was not a little felt in some influential circles.

The chief objection to these baronetcies is their hereditary character, the eldest son succeeding to his father's title. The same objection does not apply to knighthoods, which die with the grantee, and therefore are not much more than Royal honorary degrees. It has long been the custom in this Province (Ontario) to grant knighthoods to the Chief Justices; all the Chief Justices for more than forty years have been so honored except the late John Douglas Armour, formerly Chief Justice of the Queen's Bench and later of Ontario, who refused, and Richard Martin Meredith, the present Chief Justice of the Common Pleas. Others,

it is understood, would have declined, but that it is considered "bad form" for any of His Majesty's public servants to decline an honor at his hands. All the Chief Justices of Canada have also been knighted, as well as all the Prime Ministers of Canada (except Alexander Mackenzie, who declined the honor) and of Ontario since the year 1892 (except Arthur Sturgis Hardy). Knighthoods have been given for great public services, large contributions to the war, and sometimes apparently to console politicians for not being taken into the Ministry.

But now the objection to hereditary honors has extended to those which are not hereditary. The House of Commons of Canada last year (1919) passed a resolution against all titles except those given for military or naval services; and it is to be expected that the practice of granting them will cease, at least in large measure. However that may be, there is and always has been a determination on the part of the people of the Province of Ontario against hereditary legislators.

This Province was first settled by United Empire Loyalists, that is, those in the Thirteen Colonies who did not side with the rebellious in the American Revolution. These have the double disadvantage that they took the losing side in the struggle and that their enemies and detractors have since had the ear of the world. They lost, and they have

ever since been pictured by the successful party as Tories, reactionaries, traitors, and what not? They have been called men too mean and contemptible to have a good word said for them. But they were much the same as all other Americans; they took, indeed, the same view of their allegiance as their predecessors the Cavaliers in the preceding century, and had they been as fortunate they would have had the repute of the Cavaliers. Now, a century and more later, there can be no propriety in retaining rancorous feelings towards these men or in failing to recognize their real merits. They for the most part believed in the American Colonies governing themselves; but they thought the Continentals went about it in the wrong way. They believed that by constitutional means the right would be brought about, and they therefore refused to take up arms against the Crown. But they were true lovers of liberty, real democrats, and they brought their principles with them into the wilds.

"They who loved

The cause which had been lost, and
kept their faith

To England's Crown, and scorned an
alien name,

Passed into exile, leaving all behind
Except their honor." They

"Got them out into the wilderness,

The stern old wilderness.

But then, 'twas British wilderness."

With these men loyalty was a passion, and it has not been bred out of their descendants. Joined later on by the cream of immigration from the British Isles, they made this Province loyal to the core. But there was another principal equally dear to them, which is that they must govern themselves for good or ill, and govern themselves democratically.

When in 1791, by the Canada or Constitutional Act, 31 George III, c. 31, the vast expanse of Canada came to be administered as two Provinces, Upper Canada and Lower Canada, there was a provision in the Act which might have proved mischievous. The Act provided for two Houses of the Legislature, the House of Assembly elected from time to time by the people, and the Legislative Council nominated by the Crown, members of the latter House to have their seats for life. Section 6 provided that whenever "an hereditary title of honor, rank, or dignity" should be conferred under the Great Seal of the Province, the hereditary right might be annexed thereto of being summoned to the Legislative Council. Of course this was in effect making a hereditary second house like the House of Lords. This provision was wholly new; nothing of the kind had appeared in the Thirteen Colonies, and the result of the experience bade fair to be of importance to the future of the Empire.¹ But it was fated

¹ Sir George Reid, in his "Recollections" (Cassell & Co., Toronto, 1917, page 11) says that when it had been determined to grant responsible government to New South Wales in a more complete form than that provided for in the Act of 1850: "It was proposed by the committee (in Australia, who were preparing a draft Act for the Imperial Parliament to pass), on Mr. Wentworth's suggestion, that the Upper House in the new scheme should consist of hereditary peers! This suggestion provoked a lively agitation which proved fatal to the proposal."

never to be tried. Colonel Simcoe, the first Lieutenant Governor of the young Province of Upper Canada, writing from Navy Hall, Niagara, October 30th, 1795, to the Duke of Portland (the member of the Home Administration in charge of the Colonies) expressed his strong desire to increase the regard in which members of the Legislative Council were held, and so increase their influence in the country. After saying that he had established Lieutenancies of Counties with that object in view, he went on to say: "I should be very happy was there sufficient property and other qualifications in any members of the Legislative Council to see the provision of the Canada Act in this respect immediately completed by an hereditary seat derived from a title of honor being vested in their families." He explains that he desires in the Province to "check the elective principle from operating universally as it does in the United States," but finds "the House of Assembly . . . in many respects . . . tenacious and intractable." (Canadian Archives, Series Q, 282, pt. 1, pp. 8-17. The whole letter is well worth reading.) Two, Cartwright and Munro, of the Legislative Councillors who had acted in the previous year were United Empire Loyalists; another, Hamilton, was considered by Simcoe a Republican; a fourth, Baby, was a French Canadian; a fifth, Russell, was unmarried; two others, Grant and Shaw, were poor—so poor indeed that they could scarcely support their families. It is true that each of these received at least 6,000 acres of land, but this was wholly unimproved, wholly cov-

ered with primeval forest, and unsalable. The sentiment of the whole country was against hereditary legislators, and Simcoe wisely refrained from bringing that clause of the Act into force.

There is nowhere to be found any suggestion from any responsible quarter after 1795 that there should be such members of the Legislative Council, and so this Province escaped the curse of hereditary legislators—and Lower Canada was equally fortunate. While the Canada Act of 1791 was not formally repealed until the Statute Law Revision Act of 1872 (35, 36 Vict., c. 63, Imp.) it became effete on the coming into effect of the Union Act of 1840 (3, 4 Vict., c. 35, Imp.), which united the two Provinces of Upper Canada and Lower Canada into one, Canada, which Act did not contain such a provision for hereditary legislators.

No responsible person has since the beginning of the Nineteenth Century suggested a hereditary seat in the legislature. A publicist like Alexander Somerville (the once well-known "Whistler at the Plough," who wrote entertainingly on economic questions, but is now quite forgotten), contended that the "hereditary House of Lords is . . . the most vigilant guardian of human rights and progressive leader of popular freedom in the world . . . and is more severely, though not so immediately, responsible to public opinion than any of . . . the elected legislatures of the British Colonies and the United States;" yet was compelled to admit that "to endow a new assem-

bly of new nobles with large territory, titles, and hereditary functions of privilege to legislate for a new country would be a farce partaking so largely of insanity that no practical people have proposed it." ("Conservative Science of Nations, etc.," by Alexander Somerville, Montreal, John Lovell, 1860, p. 10.)

But doctrinaires have not been wanting who proposed just such a scheme; these in every case were men who were ignorant of the genius of the Canadian people. It will be sufficient to mention one only; and I select a writer practically unknown who published a book now exceedingly rare. In a book entitled "Britain Redeemed and Canada Preserved," published by Longman, Brown, Green & Longmans, London, 1850, the authors, Captain F. A. Wilson, K. L. H., G. S., and Alfred B. Richards, Barrister-at-Law, propounded a scheme for saving Britain by a large emigration to Canada, thereby relieving the congestion in Britain, which had a surplus population of 5,000,000. Of Canada they say: "She is everything to us now; our safety, our glory depend on her. . . . To yield her were an act of suicide, an act to brand the Government of Great Britain with the stamp of imbecillity. Nay, even to contemplate it is to be traitor to good sense, the nation, and the country." It will be remembered that just before this time there was a strong movement in Canada for union with the United States; Canada had been hard hit by the free trade policy of Great Britain, and the Reciprocity Treaty had not yet been negotiated.

The scheme advanced contemplated building a railway from Halifax through Quebec to the Pacific Coast—the line not very far from the lines built within the present century. This was to be built by convict labor.

Many curious proposals were solemnly advanced with which we have here no concern; the only one to be spoken of here refers to the government of the country. It is proposed by Mr. Richards to incorporate Canada with the British Isles and amalgamate the two countries, giving Canada her fair share of representatives in the Houses of Parliament. For members of the House of Lords from Canada, Mr. Richards looks to three classes, "the original English families, the original French families, and the most distinguished amongst the body of emigrants who will leave this country for Canada upon her incorporation." "Some of the oldest families in Europe" are represented "amongst the French Canadians" and "there is no necessary vulgarity amid primeval forests and on the shores of mighty lakes." But his main dependence is on "the sons of noble families" who "will have an opportunity of carrying out their talents, their patents of nobility, and their interests to assist in forming an aristocratical class in Canada" and who will "choose to go hence and enclose deer parks in America," for whom "Canadian hunting and fishing may be an inducement, as well as Canadian scenery." The author, however, does not rely upon hunting, fishing, and scenery as a sufficient incentive to noble emigrants, but advises that

"large grants of land" should be "annexed to their patents of nobility," and thereby the scions of nobility be tempted "to settle in this land of promise."

Of the three possible fates in store for Canada—annexation with the United States, by which "she would lose all nationality . . . would be merged under the dominion of a nation of tyrants . . . would be thrown back a century in the civilization of the world," and "her annexation to America would be as degrading as a conquest;" becoming an independent country, by which she would lose the protection of Great Britain, would lose British capital and trade; or incorporation with Great Britain—the author vastly prefers the last. He says: "She neither can nor will remain as she is. It is at once against reason and historical precedent. If she does, it is an injustice to her inhabitants and her name, for there is not either soul, vigour, or unity in a country so governed." Did we English-speaking peoples care tuppence for logical consistency and systematic theory of government, Mr. Richards' statements might have some force; but while a Frenchman will fight a dozen duels over a theory, we but ask of an institution, "does it work satisfactorily?" and if the answer be in the affirmative, we are quite content, no matter how much it may offend against system and consistency.

Canada has wrought and is working out her destiny in her own way to the reasonable satisfaction of her people. Whatever be the ultimate result, it may

be confidently predicted that she will not give her substance to nobles of her own land or any other, and that she will not submit to have her laws made or her government directed by those who owe their position to the fact that they took the trouble to be born. Neither knighthood nor baronetcy has ever given any right to sit in a Canadian or any other Parliament. But there is another title of honor sometimes given to Canadians which is in a rather different case. We have had a few peers of the realm. This distinction has no significance in Canadian affairs, but it entitles the owner to a seat in the House of Lords at Westminster. Some have been born to that position and therefore are free from responsibility for it; they have not, like Lord Fairfax in the United States, repudiated the title—that would be at least bad taste in a monarchical country—but they have lived as simple Canadians among other Canadians, and one at least has been a useful public servant. (By the way, Lord Fairfax' descendant has recanted and has reinstated the ancestral honors; he now resides in London, England, instead of Baltimore, Maryland.)

Of those in Canada who have been created peers, none was so honored because of being a Canadian or because of public service rendered to the state in Canada. The "Jeemses" of the British press and a very few of their imitators in Canada have persistently sought to make it appear that such creations were a compliment to Canada, but the great body of Canadians have firmly and decisively—not to say derisively—repudiated the suggestion.

Great wealth is a prerequisite; what else is necessary is kept a state secret not known to any outside a small official circle, but pretty well guessed at by the public. Leaving aside as of a bygone generation Lord Haliburton ("Sam Slick's" son), a valuable Under Secretary for War, we see in this generation Sir Donald Smith become Lord Strathcona, and Sir George Stephen become Lord Mount Stephen. Both of these were concerned in building the Canadian Pacific Railway. Sir Thomas Shaughnessy, the President of the same gigantic institution, became Lord Shaughnessy, while his predecessor was satisfied with being a simple knight, Sir William Van Horne. Both of them were Americans of very great ability, and both rendered most valuable service in their position in the Canadian Pacific Railway, but neither took any open part in the politics or the government of Canada. Sir Max Aitken became Lord Beaverbrook for services rendered the Imperial Government in time of war, and Sir Hugh Graham became Lord Atholstan; he is a wealthy newspaper proprietor in

Montreal, and only he and Lord Shaughnessy of those named reside in Canada.

These peerages play no part in Canadian life; they give certain social prestige in some circles and are probably a source of satisfaction to their possessors and their families, but otherwise are negligible; they certainly would prove a heavy handicap to any one desiring to be elected to any Parliament. Canada has no constitutional prohibition like that in Article I, section 9, of the Constitution of the United States, providing that "No Title of Nobility shall be granted by the United States," but it is quite certain that there will never be any granted by Canada; and it is equally certain that the day of any hereditary title whatever has passed in this democratic country. While the House of Commons has pronounced against even the non-hereditary honor of knighthood, it may be doubted whether public opinion at large is wholly in accord with the House on this subject.

The Essentials of a State Constitution

By Linton Satterthwaite

Of the New Jersey Bar

Hopeful signs of an increasing interest in constitutional government are not wanting. With general alarm at the spread of loose notions of government, involving disregard of the personal guaranties, a renewed devotion to fundamental principles is a natural reaction. A revival of respect for the limitations of a written constitution gives opportunity to impress on the popular mind what is the legitimate scope of its provisions. That a general disregard of the proper bounds has generally characterized the framing and making of our state constitutions will scarcely be denied by any intelligent student of government. And it may aid us to determine what may properly be the range of constitutional provisions if we consider briefly the question why there should be any written state constitutions at all.

Why then should we have a state constitution? It is easy to understand why a federal constitution was absolutely necessary. It was felt that there was need for a national government, but no national government existed; it was to be created. There was urgent call for the formulation of some scheme for a "more perfect union." Hence a written framework of government had to be created. The result was what Mr. Gladstone called "the most wonderful work ever struck off at a given time by the brain and purpose of man." And the government thus formed by the deliberate act of the peo-

ples of the different states, who possessed all the attributes of the fullest sovereignty, unlike the state governments, naturally and inevitably became one of limited powers. Since its creators took out of their store-house of sovereign powers what they chose to bestow upon their handiwork, only such portions of the absolute popular sovereignty as were consciously given could be possessed by the government thus set up. However much it may be claimed that the courts have enlarged the apparent powers of the federal government, it is probable that what seemed to the strict constructionists to be an extension of power was for the most part merely a development of the powers actually granted. For it is undoubtedly sound construction to hold that when the makers of the Constitution conferred powers on the government they were forming, they meant that those powers should be effective throughout the changes of time and circumstance wrought by invention, by science, and by social growth. It is therefore easy to comprehend why our federal system was invented. "Invention" is the proper term; for in the words of De Tocqueville, it was based upon "a wholly novel theory which may be regarded as a great discovery in modern political science." And here, as always, necessity was the mother of invention, since a federal system was to be created out of an historical void. But there was, there is, no such compelling reason for a state constitution.

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The Constitution of Canada in a War-Time Election PART I.

By William Renwick Riddell, LL. D., F. R. Soc. Can., etc.

Justice of the Supreme Court of Ontario.

The actual working of the Constitution of Canada is as well shown in a recent general election as in any occurrence of recent years.¹

The British North America Act of 1867 (30, 31 Vict., c. 3, Imp.), with its amendments, may be called the written Constitution of Canada, but one who confined his attention to the written Constitution would have a very erroneous and imperfect view of the real Constitution. As I have more than once pointed out, even the "word 'constitution' carries with it a different connotation in English and in American usage, and we in Canada follow the English. In our usage, the Constitution is the totality of the principles more or less vaguely and generally stated upon which we think the people should be governed; in American usage, the Constitution is a written document containing so many words and letters, which authoritatively and without appeal dictates what shall and what shall not be done. With us anything unconstitutional is wrong, no matter how legal it may be. With the American,

anything which is unconstitutional is illegal, no matter how right it may be. With the American, anything which is unconstitutional is illegal; with us, to say that a measure is unconstitutional rather suggests that it is legal but inadvisable."²

The British North America Act was the production of statesmen of Canada, devised and drawn by them without interference or aid from those of the mother country. It set out what the colonies desired, and was passed word and letter as so drawn. In form it was an act of the Imperial Parliament; in fact it was a compact between the Provinces forming the Dominion.³ Whatever the theories of the people of the Thirteen Colonies or their successors, there can (for a British subject) be no doubt of the legal power of the Imperial Parliament to enact valid legislation for all British possessions; and it was found necessary to seek the aid of that Parliament to give a binding character to the compact and its provisions.

¹ A general election is an election common to all Canada, at which the members of the House of Commons are chosen; with negligible exceptions, the elections for all constituencies are held on the same day, fixed by the Governor-in-Council, that is, by the Government of the day. See Revised Statutes of Canada (1906) c. 6. A special election or by-election is one held in a constituency by reason of a vacancy in its representation by death or otherwise. R. S. C. (1906), c. 11, Secs. 9 et seq.

² "The Constitution of Canada in its History and Practical Working," Yale University Press, 1917 (The Dodge Lectures, Yale University, 1917) p. 52. See also my judgment in *Bell v. Burlington*, (1915) 34 Ontario Law Reports, 619 at p. 622 (Appellate Division of the Supreme Court of Ontario):

³ A reasonably full account of the genesis of the British North America Act will be found in a paper of mine read before the Royal Society of Canada last year and printed in the Transactions of the Society for 1917, Section II, pp. 71 et seq. The authorities are referred to with particularity in that article.

Other Provinces were added to the Dominion on terms arranged with them, and three new Provinces were formed out of the territory acquired by the Dominion. (Those interested will find an account of the accretions to the Dominion in my Dodge Lectures, cited in note 2, pp. 28, 50, 51.) Prince Edward Island and British Columbia were added as Provinces to the original four, Ontario, Quebec, New Brunswick, and Nova Scotia, by Imperial power; Manitoba, Saskatchewan, and Alberta were created by the Dominion under powers given the Dominion by Imperial legislation—all this was in fact Canadian, though in form part was Imperial.

The Parliament agreed upon and provided for by the British North America Act consisted of two houses, the Senate, whose members were to be appointed by the Government for life, and the House of Commons, whose members were to be elected. (Sections 17, 24, 37.)

"Every House of Commons shall continue for five years . . . (subject to be sooner dissolved by the Governor and no longer.)" (Section 50.)

The Twelfth House of Commons had been elected in 1911, when Sir Wilfred Laurier went down to defeat

on the reciprocity issue, and it must needs come to an end in 1916, unless an amendment were made in the British North America Act. There had been considerable talk about the Governor dissolving the House before it should come to an end by lapse of time. This suggestion was, however, (speaking generally), confined to a section of the Conservative party, the party in power; the greater part of the Conservatives and practically all the Liberals were opposed to a wartime election, and the scheme did not meet the approval of the Administration.⁴

In 1916, the war continued to be actively waged, and all the resources of Canada were devoted to its successful prosecution. It was thought unwise to dissipate the energies of the nation and rouse the antagonisms which would naturally result from an election. Accordingly the Prime Minister, Sir Robert L. Borden, proposed that the term of the existing House of Commons should be extended. The Canadian Parliament had no power to do this; an attempt to do so would be "unconstitutional" in the American sense of the word and therefore ineffective.⁵ In proposing a resolution for an Address to the King for an amendment to the British North America

⁴ While in form the Governor-General has the power to dissolve the House of Commons, in this as in all other official acts he is a *roi faincant*; like the King, all his official acts are determined by the Ministry who have the confidence of a majority of the House of Commons, and he must always find a Ministry responsible for such acts. The Governor is a *lucus a non lucendo*, called the Governor because he does not govern. This is one of the things in our Constitution which are difficult of comprehension by Americans, accustomed to find the powers of their officers in written form in some document, and accustomed to governors who are such in fact and not merely in name. (See my Dodge Lectures, pp. 89 et seq.) Nay, even the word "Ministry" is not found in the written Constitution, the British North America Act!

⁵ What the American calls "constitutional" and "unconstitutional" we call *intra vires* and *ultra vires*. The American use is, however, sometimes met with, and even in the halls of Parliament. Occasionally a barrister has been known to transgress; this is not to be wondered at where, as in our courts, American decisions are cited freely and treated with respect.

Act extending the term of the House of Commons for a year, the Prime Minister said: "It is a motion which we should not press if the honorable gentlemen on the other side of the House should oppose it as a party," and "I entirely admit that no extension should be asked unless it appears to have the support of public opinion, and unless it is approved by both political parties."⁶ While asserting confidence in the result if an appeal to the electorate should be made, the Prime Minister thought it "in common with a great majority of the Canadian people, a duty to take every possible step and to use every legitimate means to prevent" the necessity of an election "during the continuance of the war." (House of Commons Debates, 1916, p. 629.) The Opposition, led by Sir Wilfrid Laurier, agreed to the resolution, Sir Wilfrid Laurier saying "if Germany wins, nothing on God's earth would matter," and in reference to the necessity of a unanimous request, "the British Parliament,

I am sure, will never under any circumstances alter the Constitution of this country except upon a unanimous resolution of the two branches of the Canadian Parliament." (Idem., pp. 632, 634.) The Senate concurred after a little grumbling in English and French by certain opposition Senators. (Senate Debates, 1916, unrevised edition, pp. 59 et seq.) The Hon. Mr. Legris said: "Je crois que le Gouvernement n'aurait pas du hesiter a soumettre sa politique aux electeurs du pays, au lieu de se faire donner un extension de pouvoir," but he did not divide the House. Accordingly a joint Address of Senate and Commons was transmitted to the Home Administration.⁷ The result was an Act of the Imperial Parliament, passed *totidem verbis* as in the Address, extending the term of the Twelfth Parliament of Canada until October 7, 1917. (6, 7 Geo. V, c. 19, Imp.)

Unfortunately the war did not come to an end before that day, and the Government were faced with the alterna-

⁶ Official Report of the Debates of the House of Commons for 1916. Vol. 122, pp. 622, 625 (Revised Edition). This is an official publication and is generally known as "Hansard."

⁷ It may be thought worth while while to set out this address in full: "Resolved that an humble address be presented to His Most Excellent Majesty the King, in the following words: To the King's Most Excellent Majesty: Most Gracious Sovereign: We, Your Majesty's most dutiful and loyal subjects, the Senate and Commons of Canada in Parliament assembled, humbly approach Your Majesty praying that you may graciously be pleased to give your consent to submit a measure to the Parliament of the United Kingdom to amend the British North America Act, 1867, in the manner following or to the following effect:

An Act to amend the British North America Act, 1867. Be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:

1. Notwithstanding anything in the British North America Act, 1867, or in any Act amending the same, or in any Order in Council, or terms or conditions of union, made or approved under the said Act, or under any Act of the Canadian Parliament, the term of the Twelfth Parliament of Canada is hereby extended until the seventh day of October, 1917.

2. This Act may be cited as the British North America Act, 1916, and the British North America Acts, 1867 to 1916.

All of which we humbly pray Your Majesty to take into your favourable and gracious consideration."

tive of another extension or a general election. It is true that under the British North America Act they could govern Canada without an election for some months, but there was necessity for Parliament to meet at least once a year "so that twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session." (British North America Act, sec. 20.) Unless its life were extended, Parliament could not sit later than October 7, 1917, and a new House of Commons must be ready to sit October 7, 1918.

The Ministry determined to give Parliament the choice, and on July 17, 1917, the Prime Minister presented to the House of Commons a motion for a Joint Address for a further extension of the life of the Parliament for one year. (The motion was really presented on July 16, but at the instance of a private member of the House the consideration of the resolution was deferred. House of Commons Debates for 1917, unrevised edition, pp. 3557, 3558. The debate in the House will be found at pp. 3593 et seq.) He advanced the same considerations as had prevailed in 1916, cited the example of

the existing Imperial Parliament, which had extended its life on three successive occasions,⁸ and that of New Zealand, which had extended its life till December 19, 1918; and after pointing out that we had about 300,000 men overseas, he suggested that all that was desired was for once to make the term of the Canadian Parliament the same as Great Britain had for more than a century and a half. But he said that if the resolution were not carried by a unanimous or practically unanimous vote, he would not press the matter further. The proposal was not accepted by Sir Wilfrid Laurier, the leader of the Opposition, who desired a vote of the electorate on the question of compulsory military service, conscription. The parties split. All those opposed to conscription, including practically all the French Canadians, voted against extension, French Canadians constituting by far the greater number (not all) of those so voting. The resolution carried, 82 to 62, there being 10 pairs. The next day, July 18, 1917, the Prime Minister said that the vote showed something very far short of unanimity or practical unanimity, and the Government did not propose taking any fur-

⁸ Before the present war the British Parliament had once extended its own life. (I do not notice the anomalous case of the Long Parliament.) The Act of 1694, 6 W. & M., c. 2, had limited the life of a Parliament to three years; in 1716, a Parliament elected under this law, on the accession of George I, extended its own life and the life of subsequent Parliaments to seven years by the Act of 1 Geo. I, St. 2, c. 38, the well-known Septennial Act. There can be no doubt of the power of the Imperial Parliament to repeal any statute limiting its life, whether that statute was passed by itself or by any previous Parliament. See my judgment in *Smith v. London* (1909), 20 Ontario Law Reports, 133, at p. 142, "Parliament has no power to control by anticipation the actions of any future Parliament or of itself." In 1716, the state of matters in Britain was very unsettled and precarious. The Pretender had invaded the kingdom in the '15 affair, and the justification for the Septennial Act was that the measure was necessary for the public security and the tranquillity of the state. Otherwise it would have been unconstitutional (in the English sense of the word), although perfectly valid.

ther action upon the resolution. Parliament came to an end, and there must be an election.

Let us pause here and examine the working of the Constitution, written and unwritten. The British North America Act, as I have said, was the result of a compact; it was the work of colonial statesmen, to which legal validity was given by an Act of the Imperial Parliament. The reason of some of its provisions is historical, and cannot be fully appreciated without some knowledge of the confederating Provinces.

Lower Canada, now the Province of Quebec, had (and has) a population largely French by descent and language; while her criminal law was substantially the same as that of England and the English-speaking Provinces, her civil law was based upon the *Coutume de Paris*. The other Provinces were (and are) largely English-speaking and of British descent. Their civil law was based upon the common law of England. Moreover, Lower Canada was very largely Roman Catholic, and the Roman Catholic Church had special privileges; the other Provinces were predominantly Protestant. Lower Canada had her "peculiar institutions," and was never quite free from the dread that she might sometime be forced into a legislative union which would enable the English-speaking people to destroy her cherished institutions. (Some of the French Canadian newspapers even now have or affect to have the same fear. Lord Durham had recommended a legislative union in his celebrated Report, pp. 226, 227.) Accordingly a federal union was agreed

to; the Provinces were given full power of legislation in matters of local moment, and the Dominion the remainder. The Provinces were given the power to amend from time to time the Constitution of the Province (except as regards the office of the Lieutenant Governor—British North America Act, sec. 92), but the Dominion was not. While no harm could accrue to any Province by the amendment of the Constitution of any other, the amendment of the Constitution of the Dominion was a different matter. Accordingly, when the unanimous agreement of the colonial statesmen that the life of the Canadian House of Commons should be five years, was incorporated in the British North America Act, there was no power given to the Canadian Parliament to change it; only one Parliament could do that, the Imperial Parliament at Westminster. Remembering that the British North America Act was a compact, not a gracious grant by the home Parliament, it necessarily follows that in all fairness there should be no change in the Act unless the parties to the compact agreed to it; and it equally follows that any change desired by the contracting parties should be made as of course. Each constituency in Canada sends a member to represent it in the House of Commons. Each section of the Dominion has so many Senators. If these members and Senators agree on any amendment, it is made; no change is made without a practical unanimity; of course, a small group of wilful men ought not to be allowed to prevent what practically all the people desire.

It is from not remembering the difference between the form and the substance that many fail to understand our institutions. The British North America Act is looked upon (as indeed it is *in law*) as an exercise of power by the superior authority conferring rights upon an inferior: *in fact*, the colonies had substantially all these rights before, and the Act is simply putting in systematic and legal form what they had decided upon. And the same remark applies to amendments. The form which the proceedings took may also be considered briefly. While in form, as we have seen, the Governor decides if and when to dissolve Parliament, it is the Ministry who make the decision. In almost all instances since Confederation, Parliament has been dissolved at the end of its fourth session.⁹ Parliament is dissolved at the time the Ministry in power think best, and there is no constitutional objection to dissolution at any time. The expression of the desires of Canada for an extension of the life of a Parliament takes the form of an humble¹⁰ Address to the

King. The King never hears of it; it goes to the office of the Colonial Secretary, who causes a bill to be drawn up in the terms of the Address, and the bill is passed (generally without debate) by the Houses of Parliament, and receives the Royal assent—an assent the Sovereign may in theory withhold, but which has not in fact been withheld since the time of Queen Anne.¹¹ No extension having been asked for, an election comes on.

(Note by the Author on amendments to the Constitution of Canada.) A reviewer in *The Nation* says that "the Constitution of Canada cannot be altered save by a Parliament in which Judge Riddell and his fellow-Canadians have no representation whatever." This is rubbish. (N. B.—I use the term "rubbish" just to get even with the reviewer for calling a statement of mine "rigmarole," and to show him that I, too, can on occasion show bad manners, not in the least to be offensive or to hurt his feelings—who am I that I should find fault with a

⁹ The Seventh Parliament was an exception. It expired by lapse of time after its sixth session in 1896. At the ensuing general election, Sir Wilfrid Laurier was returned to power and he held his place as Prime Minister till the reciprocity election of 1911.

¹⁰ With a tolerably long and extensive acquaintance with Canadian legislators, I have never yet met one who was humble. But convention is supreme in affairs of state; and even in private communications we still are the "humble servant" of a "Dear Sir" whom we detest and whom we have no thought of serving.

¹¹ I venture to think that quite too much is made by many of the so-called constitutional amendment to the British Constitution which drew the teeth of the House of Lords (1911) 1, 2 Geo. V, c. 13. This has been called the most revolutionary change in the British Constitution since the time of William of Orange (see *The Constitutional Review*, October, 1917, p. 142). and spoken of in other similar superlative language. But the statute is not part of the Constitution of Britain in the same sense as a clause in the Constitution of the United States. The American Constitution is binding upon Congress; Congress cannot repeal or amend it. But the British Act is not much more than a rule of practice; Parliament passed it; Parliament may amend or repeal it. It is at most not very different from an Act of Congress which was passed after two exciting general elections—as Congress on a mandate from the people passed it, so Congress can amend or repeal it—or a rule of court, binding upon the court and all its members till repealed, but which the court can repeal at will.

reviewer?) The form is as the reviewer thinks, the substance and the fact far different. (Moreover, I am not sure that my friend may not some of these days find himself deprived of the ante-prandial cocktail by the action of certain legislatures "in which he and his fellow-New Yorkers have no representation whatever," or if he live in some other city it may happen that his wife will be enabled to neutralize his vote through the action of legislatures in which he has no representation whatever.)

I have frequently been asked what would happen if the Imperial Parliament were to attempt to exercise its legal authority over Canada against the wishes of Canada. I have generally replied by saying: "I will tell you if you will tell me what would happen if a wholly illiterate full-blooded negro were elected President of the United States." The invariable answer is: "That is impossible," and mine: "That is the answer." One Bunker Hill was enough: the mother country learned the lesson once for all that the people of our race will govern themselves whether for good or ill. The fullest measure of self-government has been cheerfully granted, and there is no disposition to interfere in any way. This helps to account for the devoted love of Canada for her great mother across the sea, a love shown in every way and on every occasion—perhaps our contribution of 425,000 volunteers for the present war may be considered some evidence of it, a number equivalent to 6,000,000 in the United States.

There never has been an amendment to the British North America Act which did not follow the precise wording of an Address of the Canadian Parliament; there never has been an amendment refused which was asked for by Canada. It may be of interest to mention the amendments:

1. (1868) 31, 32 Vict., c. 105 (Imp.) When the Dominion was in contemplation it was thought that eventually all British North America would be consolidated. The Hudson Bay Company had by letters patent from Charles II certain rights not accurately defined or definable in an enormous tract of territory of great value. The Canadian statesmen inserted in the British North American Act (sec. 146) a provision that it should be lawful for Her Majesty on an Address from both Houses of the Canadian Parliament to admit "Rupert's Land and the North Western Territory" into the Union on terms to be expressed in the Address. Canada bought out the Hudson Bay Company for £300,000, 50,000 acres of land and 5 per cent of all land that might be laid out for settlement within fifty years; and the Canadian Parliament presented an Address, resulting in the Act which ultimately made this great region part of Canada. 193 Hansard (3d series), pp. 998, 1101.

2. (1869) 32, 33 Vict., c. 101 (Imp.) An Act enabling the Treasury to guarantee a loan by Canada to pay off the Hudson Bay Company and prohibiting Canada from impairing the priority of the charge upon her Consolidated Revenue Fund.

3. (1870) 33, 34 Vict., c. 82. A similar Act to guarantee a loan to construct fortifications. These two are not really constitutional amendments, but simply put in legal form contracts between the Imperial Government and that of Canada.

4. (1871) 34 Vict., c. 28 (Imp.) The Canadian Parliament had, by the Acts 32, 33 Vict., c. 3 (Can.) and 33 Vict., c. 3 (Can.), provided for the formation of a new Province, Manitoba, out of part of the newly acquired Hudson Bay Territory; but it was not clear that the power to do this had been given by the British North America Act. On an Address by both Houses of the Canadian Parliament (206 Hansard, 3d Series, p. 1171), the said statutes of Canada were declared valid, and power to create Provinces, etc., was expressly given.

5. (1873) 36, 37 Vict., c. 45 (Imp.) was an Act respecting guaranty of Canadian loans, like Nos. 2 and 3 above.

6. (1875) 38, 39 Vict., c. 53 (Imp.), an Act giving effect to a Canadian Act raising perplexing questions as to copyright. This statute would require a treatise to explain fully. Those interested may consult 226 Hansard (3d Series) at the places given in the index under "Canada Copyright Bill," also the Canadian Debates, 1875, at the places given in the index under "Copyright Bill."

7. (1889) 52, 53 Vict., c. 28 (Imp.) When the Dominion in 1876 set off the Territory of Keewatin, the eastern boundary of the new territory was fixed at the western boundary of the

Province of Ontario. The Territory of Keewatin was put under the jurisdiction of the Province of Manitoba. This Province claimed as part of the new territory a large area which Ontario had always considered her own. The dispute became acute; the Dominion supported the claim of Manitoba (it would perhaps be more accurate to say that the claim was made by the Dominion and Manitoba was a mere instrument). It was at length agreed that it should be referred to arbitration to determine the true west and north boundary of Ontario. Robert A. Harrison, Chief Justice of Ontario (who took the place of William Buell Richards, the former Chief Justice of Ontario, who had been first appointed by the Province), Sir Francis Hincks, a Canadian financier and Finance Minister (named by the Dominion in the place of Lemuel Allen Wilmot, their first nominee), and Sir Edward Thornton, British Minister at Washington (named by both Dominion and Province) acted as arbitrators. Their award, made in 1878, was unanimous in favor of the Province of Ontario. The Province of Ontario at once accepted the award and passed legislation to bring it into effect, (1879) 42 Vict. (Ont.), c. 2; but the Dominion refused to give effect to the award by similar legislation. (The governments of the Dominion and of the Province of Ontario were of different politics, and it was freely charged, perhaps with some truth, that this difference had no little to do with the refusal.) The governments concerned, ultimately and to put an end to the controversy, agreed to have the question disposed of by the

Judicial Committee of the Privy Council, the final court of appeal for the Empire. The matter was laid before the Judicial Committee in the form of a special case signed by the Attorneys-General of Ontario and Manitoba. The Committee heard counsel for the Dominion, Ontario, and Manitoba, and decided, August 11, 1884, (1) that the award was not binding without Dominion legislation, but (2) that the award was substantially accurate, and advised further legislation. The Dominion thought it advisable that Imperial legislation should be had, and an Address of both Houses of Parliament was sent to Westminster accordingly, resulting in this Act which settled the boundaries of Ontario. The Address is set out in the Schedule to the Act.

8. (1895) 59 Vict., c. 3 (Imp.). The Canadian Parliament had in 1894 passed an Act providing for the appointment of a Deputy Speaker during the absence or illness of the Speaker of the Senate. 57, 58 Vict., c. 11 (Can.) The British North America Act (sec. 34) provided only for a Speaker of the Senate. It seemed doubtful whether the Canadian Parliament could validly provide for a Deputy Speaker. At the request of the Canadian Parliament their legislation was expressly confirmed. Senate Debates (1894), pp. 224, 266; 36 Hansard (4th Series), pp. 1113, 1175, 1518, 1674, 1742. (Even Dr. Tanner and T. M. Healy agreed that preliminary printing might be dispensed with for this bill.)

9. (1912) 2, 3 Geo. V, c. 10 (Imp.), giving power to the Home Administration to extend prohibition of captur-

ing seals to Canada "with the consent of the Governor-General in Council," i. e., the Ministry responsible to the House of Commons and the people of Canada. This is scarcely a constitutional amendment, however.

10. (1915) 5, 6 Geo. V, c. 45 (Imp.) In view of the great increase in population and wealth of the western Provinces of Canada, it was deemed advisable to increase their representation in the Senate. An Address of both Houses of Parliament was accordingly presented, and this Act was passed *totidem verbis*. House of Commons Debates, 1915, pp. 1459 (where the Address is set out in full), 2327 et seq.; 71 Hansard (5th Series), p. 1619.

11. (1916) 6, 7 Geo. V, c. 19. Of this we have already spoken.

It will be observed that some of the above are not strictly constitutional amendments. I have, however, added them for the sake of completeness. Other statutes of the Imperial Parliament may perhaps be cited which refer to Canada more or less directly; it will be seen how carefully the rights of Canada have been guarded. (1901) 1 Edw. VII, c. 31; (1906) 6 Edw. VII, c. 20; (1911) 1, 2 Geo. V, cc. 36, 47.

How far a Canadian Province can go in the way of amending its constitution is shown by the Alberta act (1917) c. 38, which made twelve members of the existing Legislative Assembly (the only House of Parliament in that Province), who were in active service, members of the Legislative Assembly about to be elected and for the same constituency. In the present year, 1918, the Legislative Assembly of Ontario (our

only House of Parliament) has extended its life "until after the close of the present war, the return of the Canadian forces serving overseas with the military and naval services of Canada and of Great Britain and her Allies, and until one year has elapsed and a session of the Legislature has been held after a date certified by the Minister of Militia and Defence or declared by the Governor in Council to be the date of the return of the last of such forces transported from overseas by the Government of Canada."

In Newfoundland—not a part of Canada, but a separate colony—the Parliament has by the act (1917) 8 Geo. V, c. 19, extended its life to a day in 1918 to be fixed by the Government, and has limited the power of the Leg-

islative Council (the second house) in practically the same manner as the power of the House of Lords was limited by the celebrated Imperial Act, 1, 2 Geo. V, c. 13. Alberta and Saskatchewan have both given representation to their new Parliaments to soldiers and nurses on active service who elected their representatives themselves, three in Saskatchewan (one of them a woman) and two in Alberta. Alberta went even further. The Legislature of 1917 before dying enacted that twelve persons named being members who were on active service should be members of the next House without an election at all, and should in that House represent the constituencies for which they sat in the existing House.

(To be continued.)

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The Constitution of Canada in a War-Time Election PART II.

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Justice of the Supreme Court of Ontario.

In detailing the causes for the occurrence of a general election in the winter of 1917, only the routine has so far been mentioned. The real cause lies very deep and is of very great significance.¹ Canada had sent 300,000 men overseas to take part in the great war for liberty and democracy. Her men were suffering terribly, many slain, more disabled. After a total enlistment of over 400,000, volunteers came in very slowly and hardly in sufficient numbers to make up for the casualties. Something had to be done if Canada was to continue her efforts on the same scale. The Prime Minister had been in England for over two months, having been invited with the prime ministers of the other "overseas dominions" to meet in London in conference with the British Cabinet in reference to matters connected with the prosecution of the war. He returned to Canada firmly convinced that the time had "come when the authority of the state should be invoked to provide reinforcements to sustain the gallant men at the front," and so informed the House of Commons, May 18, 1917, adding: "Early proposals will be made on the part of

the Government to provide by compulsory military enlistment on a selective basis such reinforcements as may be necessary to maintain the Canadian army in the field as one of the finest fighting units of the Empire, not less than 50,000 and probably 100,000." (House of Commons Debates, 1917, unrevised edition, pp. 1613, 1614.) Sir Wilfrid Laurier, the Leader of the Opposition, did not commit himself to this scheme, although he said: "Canada intends to remain in the war to the end until victory has been won." (Idem, p. 1618.)

The Military Service Act was introduced June 11. (Idem, p. 2277. This, as we shall see, was followed immediately by the resignation of Hon. Mr. Patenaude, one of the members of the Cabinet.) On the second reading, June 18, the Leader of the Opposition moved an amendment that the question should be determined by a referendum. (Idem, p. 2506.) The lines were drawn. It was generally (not universally) believed, at least in the English-speaking communities, that a referendum would probably be adverse to the scheme and in any case would cause irreparable delay. The Bill was de-

¹ In what follows I am not to be understood as expressing any opinion of the propriety or wisdom of any measure or of any party. Under our system, His Majesty's Justice is wholly removed from the realm of politics. By statute he has no vote, nor can he be a member of Parliament; by the etiquette of his position he is precluded from expressing an opinion on any contentious public matter however important. Appointed for life he can be removed only by the vote of both Houses of Parliament, and any interference on his part with political questions would be an invitation to Parliament to exercise its powers. Even when the lines were not so strictly drawn, an undue participation in affairs of politics caused the removal of two Justices of the Court of King's Bench in Upper Canada, Mr. Justice Thorpe in 1807, and Mr. Justice Willis in 1828.

bated almost daily and from day to day in the House or in Committee until July 24, when it reached its third reading and was passed, 102 to 44, with 11 pairs.

In the Senate, the Hon. Mr. Bostock, the Leader of the Opposition, moved an amendment that the Act should not come into effect until after the general election. This, after a long and animated debate, was negatived, 44 to 34, and the Bill received its second reading, 54 to 25. It passed rapidly through committee and received its third reading August 8, 1917. (Debates of the Senate, 1917, unrevised edition, pp. 371, 384 et seq., 411 et seq., 554.) The Royal assent was given August 29, and the Act became law. (Military Service Act, 1917, 7-8 Geo. V, c. 19, Canada.) While the Bill was under discussion in the Senate, it seemed doubtful whether the Government would have a majority there. But there were several vacancies in the membership, caused by death. The British North America Act (sec. 32) gives to the Governor General the power to fill all vacancies in the Senate "by summons to a fit and qualified person;" and the Government in the name of the Governor General gave a summons to a number of "fit and qualified" persons accordingly. One of the tests of fitness was of course deter-

mination to vote for the Bill. Those so appointed did vote as expected.

Immediately after the decision to introduce the Bill in the House of Commons, an incident occurred which passed almost without notice in Canada, but which will help to an understanding of our Constitution by those unacquainted with it. As I have said, the British North America Act says nothing of the Ministry, but everyone in Canada knows that the Ministry is a body of Members of Parliament brought together by the Prime Minister, who has the confidence and can command the majority of the votes of the House of Commons.² They are the "Government," the "Administration." While, so far as anything in the written constitution is concerned, the Ministers might be of all shades of opinion, and while by constitutional usage there is nothing to prevent the most violent controversy in the secrecy of the Council Chamber,³ still, in our constitutional practice, when a policy is decided upon, all conflict must cease and every member of the Administration must take the responsibility for it. There is no such thing as divided responsibility.⁴ If any Minister is not prepared to support with his whole heart and to stake his political future upon any proposed measure, he must resign.

² Those who are unacquainted with the system of "responsible government" and wish to know something of it are referred to my Dodge Lectures, "The Constitution of Canada," Yale University Press, 1917, at pp. 91, 92, 93, 94, 96, 121. As to the appointment of Senators, see pp. 66-69, 82, 83, 102, 103, 114, 123.

³ One very noted Canadian politician is alleged to have said: "We fight like blazes in Council." Whether he said it or not, the fact is notorious.

⁴ The Dodge Lectures, p. 96. An English Minister is reported to have said: "We must all hang together or hang separately." (Benjamin Franklin has been credited with the same remark—it has become a political commonplace; I have heard the late Sir John A. Macdonald use it). Matters are not quite so dangerous as that in Canada, but a house divided against itself cannot stand.

When it was determined to introduce the Bill for compulsory military service in the House, the Hon. Mr. Patenaude, Secretary of State, resigned his portfolio, as he was opposed to the Bill on principle. To understand Mr. Patenaude's position it will be necessary to say a word of the history of his party. It will be understood that I shall speak in generalities and without expressing an opinion, being concerned solely with the facts. When Sir Wilfrid Laurier was in power, he had for a time a brilliant group of young French Canadians as followers. By the participation of Canada in the South African war, the attention of Quebec was drawn to the fact that the sons of Canada might possibly be called upon to take part in wars in which Canada did not appear to have an immediate interest. A very considerable amount of dissatisfaction was manifested both in public and in private, at Canada's participation in that war; and when Sir Wilfrid in 1910 announced his policy of forming a Canadian navy as Canada's part in the defence of the Empire, there was an open break in Quebec. MM. Bourassa, Asselin, Lavergne and others formed the Nationalist party whose policy was "no participation in Imperial wars." The old Conservative (or Bleu) party almost disappeared, and the Province was practically all Liberal or Nationalist. In the election of 1911, the Nationalists joined hands with the Conservatives, who were opposed to Reciprocity with the United States; the Nationalists were concerned not so much to defeat Reciprocity as to drive from power their fellow French Canadian whom they

accused of betraying their race. He was too British for them—"anything to beat Laurier." The election resulted in a majority against Laurier, a majority of which an important part was the 27 Nationalist Members elected in Quebec. The new Prime Minister, Mr. (now Sir Robert) Borden, must needs recognize the Nationalists. While Bourassa, the chief leader (it is said) declined office, four of the Nationalists were called to the Cabinet. When the new Government announced the policy of helping Britain by paying for three Dreadnoughts, one of these, Hon. Mr. Monk, resigned, October 22, 1912. Some changes afterwards took place unnecessary here to go into, and on the outbreak of the war there were three Nationalists in the Ministry. They raised no objection to volunteers being sent from Canada; one of them indeed, M. Blondin, himself put on the King's uniform. Not a few Nationalists volunteered, at least one of the leaders, M. Asselin, amongst them. But when compulsory service was proposed, M. Patenaude could not approve and consequently resigned. MM. Blondin and Sevigny accepted the measure and remained in the Ministry. They were both defeated at the general election, in common with every other French Canadian in Quebec who supported conscription, and having no seat in Parliament they must resign on or before the meeting of Parliament (unless indeed they could be saved by the soldiers' vote, not then counted; when these votes were counted later it was found that both were defeated and they have resigned).

During the whole summer of 1917, and almost from the beginning of the war, there was an agitation more or less active for a Coalition Government. The party system is thoroughly developed in Canada (see the Dodge Lectures, pp. 91-105) and for many years there have been two well-defined political parties; third parties have never thrived. That party which has the majority in the House of Commons must take the responsibility for all legislation and all acts of government. It is unconstitutional (in our sense of the word) for a Cabinet to be divided in opinion on public questions. The result is that all the Ministry must be of one political creed. But there is a precedent for a Ministry composed of members of both political parties. When it was thought that confederation of the British North American colonies would prove of advantage, the leaders of the two parties in Canada, Mr. (afterwards Sir) John A. Macdonald and Mr. George Brown joined hands and formed a Coalition Government to carry the scheme into effect. (See the Dodge Lectures, pp. 29, 115.)

The movement for a Coalition Government during the war secured scant attention from politicians at first; but when the proposal was made to have compulsory military service, it could not but be evident that both parties should share the onus. The Prime Minister asked Sir Wilfrid Laurier to join him in an administration, placing half the portfolios at his disposal; but this offer was predicated upon enforcing military service, and Sir Wilfrid declined. At some meetings of prominent members of the Liberal (Opposi-

tion) party, it looked as though Sir Wilfrid's attitude would be approved. Sir Robert Borden, however, did not lose heart. He entered into negotiations with leading members of the Liberal party, and ultimately a Coalition was formed and a Ministry sworn in composed of substantially the same number from each party. This was unconstitutional (in our sense) unless justified by the emergency, as to which there was and is much difference of opinion. However, the rupture of the Liberal party, which was made manifest in the House of Commons by many of the Liberal members voting against their former leader, Sir Wilfrid Laurier, on the question of extending the life of Parliament and more particularly on that of compulsory military service, was carried to its logical conclusion. Those Liberals who voted against Laurier did not cease to be Liberals; it would hardly have been possible for them, remaining Liberals, to support a Conservative Administration; and a logical solution was found in the formation of a Coalition Government.

Another preparation for the general election was considered to be the voters' list, that is, a decision as to who should vote. By the British North America Act, section 41, the Parliament of Canada has the power to fix the qualifications of voters, but until it should pass legislation on the subject, the provincial franchises were to prevail. From 1867 till 1885 the Provincial franchise was accepted. In 1885 the Dominion fixed the qualifications of voters. This was not wholly satisfactory, and in 1898 the Dominion

reverted to the old system.⁵ In 1915 the right to vote was given to every male British subject of 21 years of age or upward serving in the military forces of Canada in the present war who had within six months before his enlistment been resident in Canada. Every such person was given the right to vote in the electoral district in which he had so resided, unless he had a vote in some other electoral district, and absence from Canada did not debar him from voting, provision being made for taking his vote abroad. (5 Geo. V, c. 11, Dom.)

The Minister of Justice, Mr. Doherty, introduced a Bill, August 13, 1917, the purpose of which he said was to make more adequate and complete provision for taking the votes of soldiers, but which at once he showed to be of much greater significance. That Bill made a military elector of every person, male or female, who was a British subject, whether or not ordinarily resident in Canada, and whether or not an Indian, and who within or without Canada was enrolled for active service in the Canadian forces, or within Canada in the Flying Corps, the Naval Air Service, or Auxiliary Motor Boat Patrol Service (which are technically Imperial), whether as "officer, soldier, sailor, dentist, nurse, aviator, mechanic, or otherwise" (if he had

been honorably discharged, his qualification was not lost), also every person, male or female, a British subject ordinarily resident in Canada, whether or not a minor or an Indian, who was on active service, military or naval, in Europe in the forces of the King or of the Allies.⁶ For the first time in the history of Canada, the right to vote by one who did not appear in person at a polling booth in Canada was given by the Act of 1915. In the present Act, for the first time in Canada, the right to vote was given (1) to persons not ordinarily resident in Canada, (2) to women (nurses), (3) to minors on active service. The Bill was rather languidly opposed in the House of Commons. Some complaint was made that persons who never saw Canada and might never see Canada, who knew nothing and cared nothing about Canada, might vote,⁷ that the woman who chanced to be a military nurse had a right to vote, while another woman equally valuable to the nation by her services at home had none, and that boys of 18 or less should have a vote because they were abroad instead of at home. (There was not much complaint about the Indian.) But the Bill passed without a division. (House of Commons Debates, 1917, unrevised edition, pp. 5479, 5480.) The same approval was given by the

⁵The Electoral Franchise Act (1885) 48-49 Vict., c. 40 (Canada). This was a party measure, the Liberals demanding the acceptance of the Provincial lists, the Conservatives insisting upon a separate Dominion franchise. The act of 1885 was passed only after a long and bitter struggle, and when the Liberals were returned to power, as they were in 1896, they repealed the obnoxious act and reinstated the Provincial franchise. (1898) 61 Vict., c. 14 (Canada).

⁶7-8 Geo. V (1917), c. 34, sec. 2c (Canada). The Royal Flying Corps, Naval Air Service, and Auxiliary Motor Boat Service are filled with young Canadians, but technically belong to the Imperial Forces.

⁷By our law everyone is a British subject whose father or grandfather, when he was born, was a British subject, though he himself may have been born abroad.

Senate after at least one vigorous protest. (Debates of the Senate, 1917, unrevised edition, pp. 837, 1052, 1103 et seq., 1191 et seq. See the speech of Hon. Senator Cloran, pp. 1100 et seq.)

One provision of the Act may be here referred to as it will come up again in another connection. Every military elector was to have his vote counted in the electoral district in which he had resided four months of the twelve preceding his enlistment if he could specify such a place; if he could not, then in any electoral district in which he had ever resided; if he could not specify such a place, he could allot his vote to any electoral district. (7-8 Geo. V, c. 34, sec. 3, Dom.) Military voters were allowed to vote for a party, Government, Opposition, Independent, or Labor (quite a novel provision) or for an individual. The Prime Minister, the Leader of the Opposition, and the recognized leader of any independent or labor organization was to name the approved candidate of his party. It is possible that the absence of any real objection to this act was due to the reason that those enfranchised might be expected to belong to both parties, not to one, and no great gain was to be expected from a defeat of the Bill.

But the case was quite different with another Bill, the War Time Elections Act, (7-8 Geo. V, 1917, c. 39, Canada). On its introduction in the House of Commons, it was explained that the

Act was mainly to repair the injustice which it was felt those overseas were visited with in not being able to exercise upon their fellows the influence they could exert under normal circumstances. It was proposed to do this by giving a vote to every woman, a British subject qualified as to age, race, and residence, who was the wife, widow, mother, sister, or daughter of any person, male or female, living or dead, who served in the military forces of Canada without Canada, or in her naval forces anywhere.

Certain of the Provinces had woman suffrage. In the ordinary course it was to be expected that all women who had the provincial suffrage would have suffrage for the Dominion also.⁸ Those opposed to conscription were not unnaturally of the belief that women would vote against any measure which would subject their men-folk to the draft, but they believed with equal probability that most of those whose own men-folk had gone overseas would vote that other men should go to their relief. In any case, this was a partial enfranchisement. No woman had ever voted at a Dominion election; and there was very little objection made by women who were not enfranchised at their exclusion from the vote.

But a large class of voters were deprived of the right to vote which they already had: Mennonites⁹ and Doukabors (who had been exempted from military service) except

⁸ There is a difference of opinion amongst legislators as to whether, without this Act, all women voters in such Provinces would have a vote for the Dominion. I do not pass upon the question.

⁹ Quakers, "Menonists," and Dunkers were exempted from military service in Upper Canada as early as 1793. 33 Geo. III, c. 1, sec. 22 (U. C.).

such as should have volunteered and been placed on actual service, and also all who applied for exemption from military service on conscientious grounds were deprived of a vote. (1917, 7, 8 Geo. V, c. 39, sec. 2, amending sec. 154, Dom.)

Then followed a far-reaching provision. No one was to be allowed to vote who, born in an enemy country or in a European country, whose mother tongue was the language of an alien country, had not been naturalized on or before March 31, 1902, except volunteers who had enlisted or tried to enlist, or their grandparent, parent, son, or brother, or Christian Syrians or Armenians, or women qualified as kin of a combatant.

The reason for the exclusion of non-combatants is obvious. The election was to be a war-time election, the issue was to be conscription, and it was to be expected that they would vote against conscription. The Provinces of Saskatchewan and Alberta have a large population of inhabitants of German and Austrian extraction. (I have been told by a former Lieutenant-Governor of Saskatchewan that thirty per cent of the people of that Province are of German or Austrian extraction. Official returns show that from July, 1900, there had come into Canada immigrants from Austro-Hungary, 200,016, from Germany 38,807, from Bulgaria 32,267.) While these did not prove themselves so offensive as many of

their race in the United States, it was notorious that the sympathies of many were with their fatherland, and it was to be expected that most would vote against any measure intended to send them or other soldiers to fight against their kin in Europe.

Many of these immigrants and their sons volunteered for service against their European kinsfolk. Wherever their origin was known they were rejected, but no small number passed themselves off as Russians and so were accepted as Canadian soldiers. It was not proposed to take away the vote from such soldiers or their male kinsfolk in the first or second degree. These provisions for disfranchisement were bitterly fought in Commons and Senate. On the one hand it was claimed that it would be a Prussian-like breach of faith with these men who had been induced to come to Canada and become British subjects on the implied promise that they should have all the rights of British subjects. Sir Wilfrid Laurier said (House of Commons Debates, p. 5889): "This is not a Liberal measure, it is not a Canadian measure, it is not a British measure; it is a retrograde measure and a German measure." On the other hand it was claimed that no one, simply as a British subject, has the right to vote. "The rights of British subjects are rights given under the law of Canada. The law of Canada must be dictated by the needs of the hour for the safety of Canada."¹⁰ No promise express or

¹⁰ Even a Province has the right to deny any class of British subjects the vote. The franchise, whatever theorists may say, is a privilege granted or withheld at the option of the state, not a natural right. The Judicial Committee of the Privy Council, on final court of appeal, decided that a Province has the right to deny the franchise to Japanese, even though they may be British subjects. *Cunningham v. Tomes Hanna* (1903), A. C. 151. Hundreds of thousands of British subjects, hundreds of thousands of American citizens have no vote. The words quoted are those of Hon. Mr. Meighen, who took the lion's share of the debate on the Government side. House of Commons Debates, 1917, p. 5898.

implied had ever been made to these Germans and Austrians.

After a long and strenuous fight in House and Committee, the Bill received its third reading, September 14, 1917, when it was carried by a vote of 53 to 32, there being a large number of pairs, 41 in all. Most, but by no means all, who voted or were paired against the Bill were opposed to conscription. All in favor of the Bill were in favor of conscription. (House of Commons Debates, 1917, unrevised edition, pp. 5723 to 6199 almost continuously.) The Senate, after little debate, and that almost a repetition of what had been said in the Commons, gave the Bill its third reading September 19, with a few amendments of no consequence here. (Debates of the Senate, 1917, unrevised edition, pp. 1205 to 1324 almost continuously.) It received the Royal assent the next day: and Parliament was prorogued.

The general election came on with the Liberal party rent in twain. While there were here and there little eddies of personal ambitions, local animosities, old political prejudices, the broad issue was compulsory military service as a means of prosecuting the war. While Sir Wilfrid Laurier insisted that Canada was in the war to the finish and confidently asserted that if he were returned to power he could and would procure a sufficient and satisfactory number of recruits without compulsion, and while most of his supporters in the English-speaking Provinces were in favor of pressing on the war—some indeed were openly and

insistently in favor of conscription—still in the Province of Quebec and in some parts of Canada where the French-Canadian vote was decisive, there was plain speaking against Canada's further military participation in the war.

The real cause of the necessity for conscription was the failure of the Province of Quebec to furnish a number of volunteers in proportion to her population. The reasons assigned are various, and I do not discuss them. Sir Wilfrid Laurier and many others openly and repeatedly said that it was the fault of the recruiting system of the government that the required numbers were not secured. No doubt mistakes were made, as have been made in England, Ireland, the United States, all democratic non-military countries. Whether other methods would have been more successful is a matter of opinion.

Perhaps it would not be out of place to mention the reasons for Quebec's failure to respond more generously to the call for volunteers, as given by a French Canadian Senator (the Hon. L. O. David, August 8, 1917, Debates of the Senate, 1917, unrevised edition, pp. 639 et seq.) (1) Since the cession of Canada, the French Canadians have been taught by their political leaders that they never would be forced to go and fight outside of Canada. (2) Candidates and their friends at previous elections had stated that the safest way to avoid conscription was to vote for the Government at these former elections. (3) There were three, and are

now two, members of the Cabinet who were elected by declaring and promising that they would be opposed to any participation of Canada in the wars of the Empire. (4) These Cabinet ministers had convinced French Canadians that participation in the war was almost a crime, and that Laurier and his friends were traitors to Canada. (5) Even when recruiting was going on, they were told that the best way to serve the Allies was to furnish food and munitions. (6) They had heard that the Government were spending much money to induce American workmen to come to Canada and had induced a large number to do so; this proved the great need of labor at home. (7) The French Canadians had not been regimented together as promised, but scattered among the English regiments commanded by officers whose language they did not understand. (8) No amount of enlistment and war service of all kinds was effective to "stop the wave of invective and accusation of which they were the victims." (9) The French Canadians are the most peaceful people in the world, and very few have had any military training. (10) Faithful lovers of Canada, they were inclined to concentrate all their affections upon her. (11) They were convinced that conscription was directed against them.

Whatever the cause and however great the default, no few French Canadians volunteered, amongst them some Nationalists, and their valor and efficiency were proved in many a bloody battle. The memory of their gallant deeds will never die till Courcellette is forgotten.

On the Government side there was a clear stand taken. "Anything to win the war; Canada cannot desert her boys at the front." Conscription was held to be necessary, and a Government must be returned whole-heartedly in favor of it and to be trusted to enforce it vigorously and without delay. The result was the return of the Union Government with a substantial majority, a majority now increased by the votes of the soldiers in Britain and France.

It was expected that the provision already mentioned giving the non-resident military voter the right to allot his vote to any constituency might have curious results; but no difficulty has in fact followed.¹¹

All the peculiar provisions for the franchise are recognized as being unusual and contrary to practice—unconstitutional in our sense of the word, though perfectly valid and therefore constitutional in the American sense. They are considered to be justified or

¹¹ A curious complication has arisen in connection with the Yukon, which has one member in the House of Commons—the Opposition candidate received a majority of the votes cast in the Yukon, but on the soldiers' votes being counted abroad it was found that this majority was more than overcome by that vote. The Opposition candidate contended that the soldier vote should not be counted; the Military Voters Act provided that the Prime Minister, the Leader of the Opposition and other Leaders should notify their choice of candidate "within five days after the day of nomination." The election for the Yukon was delayed and the votes of the soldiers taken before the nomination in the Yukon. The House of Commons will determine as to the validity of the soldiers' votes. *Adhuc* (May 17) *sub judice lis est*. [Now, (June) the House has determined in favor of the validity of these votes, and Mr. Congdon, the opposition candidate, is definitely defeated.]

excused by the exigencies of the present state of affairs in Canada, but no one would think of making them permanent. Accordingly the disfranchisement only lasts "during the present war and until demobilization after the return of peace," and the whole question of woman suffrage is promised early attention. It will probably be considered that much of this legislation was on Sir Wilfrid Laurier's principle:

"If the Germans win the war, nothing else on God's earth matters," certainly some of it was.

Whatever else may be said or thought of Canada, I think all will concede that she is willing to do and risk anything rather than fail to do her part in the war. And whatever else may be said of her Constitution, it is flexible enough to enable her to do her full duty.

Patriotism and Democracy

By Wm. Howard Doughty, Jr.

Professor in Government, Williams College.

The charge has frequently been made against democratic peoples generally, but especially against the people of the United States, that they are so commercialized, so deeply engrossed in the struggle for wealth, that they are incapable of feeling or manifesting any devoted or sustained patriotism. At times, before our entry into the war, it has seemed almost as though we in America would have to admit the justice of the charge. Since April, 1917, however, all is changed, and the events of the last ten months more than justify the proud conviction that we are as ready as any people on earth to give our all for the defense of our homes, our institutions, and our ideals.

We are by instinct and tradition a peace-loving people. Our marvelous prosperity is due as much to the fact that we have heretofore been spared the menace of war as to the vast natural resources within our borders. We have heard from time to time, like the thunder of some far distant storm, the

rumblings of Continental discord. But we have been undisturbed. We have gone our peaceful and contented way, taking so much as a matter of course the blessings of our security that it is to be feared we have at times failed to appraise them at their true value. So great was this sense of security that it was impossible for many, even after two years of war the like of which the world has never seen, to believe that the storm would or could strike us. When, however, it became clear that our position, though probably safe for the present, even should Germany win, could not long remain so, we became suddenly aware of the value of all that we had been taking as a matter of course, our free institutions, the sanctity and security of our homes, the Anglo-Saxon ideal of womanhood, the Anglo-Saxon ideals of honor, humanity, and justice. We began to realize what a hell on earth would be this land of ours if subjected to the arrogant, cruel, and unscrupulous dictation of

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The New British Empire

By the Honorable William Renwick Riddell, LL.D., F. R. H. S., etc.

Justice of the Supreme Court of Ontario

The death blow to the British Empire was struck in Canada. The conquest of Canada in 1759 was the turning point in the history of the English speaking peoples, and consequently in the history of civilization. So long as Canada remained French, there was an ever-present fear in the northerly English American Colonies of French and Indian invasion. Whatever formal peace there might be in Europe, there was always war or "near war" in America; and the Bostonian did not compare the Frenchman to Satan, but Satan to a Frenchman. English America never was safe from the French, and knew that in the long run her security came from Britain.

When terms of peace were discussed with France no small or uninfluential number of British statesmen strongly favored giving up Canada to the French and retaining Guadeloupe, which produced £300,000 worth of sugar every year, while Canada was "a few arpents of snow."

Vergennes gave a solemn and emphatic warning of the result to be expected from Canada becoming permanently British, and some Englishmen agreed with him. It was largely due to the "Canadian Pamphlet" of Benjamin Franklin (1760), then the agent at London of Pennsylvania, that Canada was retained. He met the suggestion that the colonies might become

dangerous by the statement that such was the jealousy of the thirteen colonies of each other that they had been unable to effect a union even for their common defense and security against their enemies, however sensible each colony had been of the necessity. (Works of Benjamin Franklin, Longman & Co., London, 2nd Edit., Vol. iii, page 132.) There had been many and bitter complaints of the Mother country on the part of the colonies; but Franklin's arguments seem to have quieted the fears of the Administration, and Canada was retained.

The pressure being removed on the north, it was not long before Vergennes' prophecy was fulfilled, and the British Empire was torn asunder. I mean the old British Empire, an empire built largely in fact on the model of the Roman Empire—the real Roman Empire, not the Holy Roman Empire, which, as has been said, was not holy, not Roman, not an empire. As Rome was the center of the Roman Empire, where sat the Emperor, sending out his servants to govern the dependencies for the sake of Rome (and incidentally of the governors themselves), so at London sat the King, who sent his governors to the colonies, which were considered to exist for the Old Land, and not for themselves. A certain amount of self-government there was in English as in Roman provinces; but it was the advantage of the central part

of each Empire which was the ultimate test of all measures of legislation or government.

"Ships, colonies, and commerce" was long afterwards a political "slogan"; in the old British Empire the phrase would have been a gross pleonasm. Ships were valued as vehicles for carrying commerce or as a guard to prevent others interfering with commerce; colonies were valued as furnishing a market for commerce; and the whole cry might be summed up in the one word "Commerce." Napoleon was wholly right in dubbing the hereditary enemy a "nation of shopkeepers," and no one need be ashamed of the name. No one will be who recalls the downfall of *la gloire* a century ago and of *weltmacht* but yesterday. Great exceptions there no doubt were, but, speaking generally, the colonies were considered but as markets, not as nations.

The American Revolution came as a bitter but salutary lesson, a lesson never long forgotten at Westminster. Thereafter the principle was "one Bunker Hill is enough," and (speaking generally) the right of a colony to exist for itself was recognized. It was a principle steadily followed that a colony was to receive as great a measure of self-government as it could successfully apply, and receive this speedily. There has been no jealousy in England of self-government in the colonies; on the contrary, there has been a constantly increasing pride in the success of the growing children.

The story of Canada is the story of the evolution, not yet quite complete, of the new British Empire.

There must always be two classes in any live community, the conservatives and the reformers, the former instinctively opposing, the latter as instinctively approving, change. It has been said that all the stupid are conservative and all the fools reformers; but there are many, neither stupid nor fools, who belong to either class. It is a matter of what used to be called "temperament," due to birth and descent as well as to education. The conscious mind is educated, but the unconscious has ever its full effect. Philosophers, psychologists and others are just now beginning to understand something of the power of the mind below the plane of consciousness.

"I often think it comical

How Nature always does contrive
That every boy and every gal
That's born into this world alive
Is either a little Liberal

Or else a little Conservative."

Gilbert's jingle is "half in fun, but whole in earnest."

In the time of Charles I, the conservative Cavaliers opposed the Liberal Roundheads. Later in the time of his son James, the Jacobites held to the King, and the Whigs, with a sprinkling of so-called Tories (but Tories renouncing the true Tory doctrine) enacted the Bill of Rights. In the next century, no small number, if not an actual majority, of the colonists in America were conservative and loyal to the Crown; but they failed, for various reasons, to hold their colonies fast. These men, the Tories of the old American school histories were as worthy of

honor as their congeners of the previous century, the Cavaliers and the faithful Jacobites, but they have until the other day received in the United States little but execration. On the peace treaty of 1783 becoming effective and the new nation acknowledged, thousands of these devoted and faithful men made their way into Canada, Nova Scotia, New Brunswick, Prince Edward Island, "leaving all behind except their honor," and it was these men who, with immigrants from across the sea, laid the foundation for the new British Empire—which is not an empire at all.

The principle of local self-government is the living and essential principle of the British world. He who would understand this world must adopt the rule "Things are not what they seem," and reject the Italian's "*Le cose non sono come sono ma come si vedono.*" The British Constitution, which is *mutatis mutandis* the Constitution of the self-governing dominions, is the most marvelous piece of camouflage¹ the world has ever seen. What seems perfectly plain, in many cases is found to bear the very opposite of its plain meaning. The King "by the Grace of God"—as everyone knows and he knows and is proud of the fact—is King by grace of an Act of Parliament; "Defender of the Faith," like King Henry VIII, who became such by defending the faith of the Roman Catholic Church against Luther, though the King must by law be a Protestant; Commander in Chief of the Army and

Navy, he does not appoint a lieutenant or a midshipman; Head of the Church, he cannot select a curate. He is also King of the *United Kingdom* of Great Britain and Ireland.

It was only by reason of the camouflaging potentialities of the British Constitution that changes in spirit were wrought out without disturbing the mediaeval form, and that colonies became self-governing Dominions without a wrench. We build more stately mansions on the old foundations; we engraft into the old stock new shoots to bear fruits of which the stock was incapable; and we transform the life and the spirit without change in the letter; "the letter killeth and the spirit giveth life."

The story of the growth of "the Colonies" is an interesting one. It would be impossible in the ambit of an article or of twenty articles fully to detail the successive changes even in Canada alone. Perhaps it will be sufficient to state in outline the history of the movement in my own Province, formerly called Upper Canada.

Upper Canada began her Provincial career in 1791-2. She had a Lieutenant Governor appointed by the Home Administration to govern the Province. He was not at all responsible to the people of the Province or to any one but the King across the sea, who appointed him and paid him. For the Lieutenant Governor were selected by the Home Government his Executive Council (often indeed at his own suggestion),

¹ See this note and other notes, 1 to 15, inclusive, collected at the end of the text of this article.

who administered the Province and were responsible to him alone, or, in the last resort, to the King, as the members of the Cabinet at Washington are responsible only to the President. The judges, law officers, sheriffs, etc., were appointed and paid by the Home Government. The Province had two Houses of Parliament, but the Lieutenant Governor could and sometimes did withhold the Royal Assent to bills passed by them, or he might and often did send the bills across to Westminster for approval or disapproval. This system the first Lieutenant Governor of Upper Canada, Colonel John Graves Simcoe, called the "very image and transcript" of the Constitution of the Mother Country; and in form it was, but in spirit far from it. This primitive system prevailed for about a quarter of a century, when the Province began in part to pay its way, and it was not long before an agitation already in the air began to be active for the responsibility of the Executive to the people through their Representatives in the House of Assembly. Naturally the official class resented the proposition for a change, as privileged classes, office holders, politicians, manufacturers or other classes, always do and always will. A rebellion broke out in 1837, the culmination of the movement and looking to an independent republic. Sir Francis Bond Head, the Lieutenant Governor, sent the English soldiers to Lower Canada to deal with the French Canadian rebellion there, and Upper Canadians themselves crushed the rebellion in their Province. This *émeute*—for it was little more, and would have been nothing more but

for American "Sympathizers"—was a blessing in disguise. It came as a thunderbolt, and wakened the Home Administration to the fact that all was not right in the Colony. Of course the King's Ministers must needs rely upon the reports of the Governors; the Governors, having in general a short term of office, must needs rely upon the official class; and the official class, being in possession of all executive power, and having the spending of the public money, must needs believe that all was for the best in the best of all possible Colonies. One Bunker Hill was enough; one Gallows Hill² was too much. One of the greatest statesmen of England or any other country, of that or any other time was sent out to make enquiry in the Colony. Lord Durham, both personally and through his very able assistants, Charles Buller and Gilbert Wakefield, made a thorough examination on the spot, and found that the colonists had not been enjoying the rights of freemen. Durham's Report is a classic, and even yet, fourscore years later, well repays attentive perusal.³ The result of his report was the Union Act of 1840, whereby the two Canadas were united, and a great step was made towards complete self-government, responsible government.

As Responsible Government is one of the finest examples in the British Constitution of what I have been calling camouflage, it may be well to dwell a little upon it. In form, the King may call upon any one of the hundreds of millions of his subjects to be his Chief Minister, and for centuries the King did precisely as he pleased in that matter. But for generations in Britain the

King must call that one person who can obtain a majority of the votes of the House of Commons.⁴ If a Prime Minister cannot obtain or retain a majority of these votes, he must get out and give place to one who can.⁵ A Ministry is one; the Ministers stand or fall by each other (if they remain in the Ministry); they may "fight like blazes in the Cabinet,"⁶ but must show a united front to the House and to the country, and when there is an adverse vote of the House of Commons, the Ministry must resign, and the King calls another Prime Minister. This system has for generations been in full vigor in Britain, but in Upper Canada the worn-out system was still in vogue of the King's representative, the Governor, choosing his own Ministry, and they responsible to him, not to the people's representatives in the House of Assembly.⁷ Without any change in form, the old system substantially came to an end at the Union.

No one can find anything in the text of the Union Act of 1840 (3, 4 Vict., c. 35, Imp.) which so much as suggests any change in the Constitution. The Governor, "according to his discretion, but subject . . . to such instructions as may from time to time be given in that behalf by His Majesty," might assent to a bill passed by the two Houses of Parliament, or might withhold Her Majesty's assent or reserve the bill for the signification of Her Majesty's pleasure therein. The powers exercised under the Canada Act of 1791 by the Lieutenant Governors with the advice and consent of the Executive were to be executed in the same

way under the Act of 1840. The new Province of Canada was indeed to pay £45,000 per annum to Her Majesty to provide for the salaries of the Governor, the Judges, Attorneys and Solicitors General, etc., but the warrants for such salaries were to issue under the hand and seal of the Governor, etc. In the Legislative Council, Her Majesty was to authorize the Governor to summon such Members as Her Majesty saw fit. Everything looked on the surface as autocratic as in the most autocratic colonial times. There was not a word as to how the Executive Council was to be formed, and indeed the only reference to the Executive Council is in the section 45, already referred to in speaking of the powers of the Governor. No one by reading the Act could possibly conjecture the tremendous change intended to be brought about, that is, responsibility of the Executive to the people of Canada through their representatives in the Legislative Assembly.

Sir Francis Bond Head, who became Lieutenant Governor in 1836, as consummate a fool in political matters as it was possible for so clever a man to be, had appointed to the Executive Council several persons in whom the House of Assembly had confidence, but he repudiated the constitutional doctrine that the Executive should resign where they failed to obtain a majority in the House, and he never gave them his confidence. So far from admitting that he must govern on their advice, and that only so long as they had a majority of the House, he acted without and sometimes against their advice. They of course resigned.⁸ Sir George

Arthur, the last Lieutenant Governor before the Union, held the same views as Sir Francis Bond Head. The Union Act in itself did nothing to change the system, but none the less the system was changed. It was understood that in the new Canada formed by the Union of Upper and Lower Canada the Executive must have the confidence of the Lower House, as in England, and the Governor must act on the advice of such Executive.

The royal instructions to the first Governor after the Union, Poulett Thompson, Lord Sydenham, were that "it will of course be your anxious endeavor to call to your Councils, and to employ in the public service, those persons who by their position and character have obtained the general confidence and esteem of the inhabitants of the Province." Camouflage quite intelligible to Sydenham—party government, responsible government. The next Governor, Sir Charles Bagot, had instructions which seemed to give him the right to call to his Councils the best men of all parties, and his course was not an advance but rather a retrogression.⁹ Under the following Governors, there were ebb and flow, but on the whole there was a progression toward full responsible government. It is perhaps not possible to say definitely when the last nail was driven in the structure, but by 1850 it was fairly complete. Canada was admitted to exist for Canadians, and Canadians were admittedly entitled to govern themselves.¹⁰

When the principle was acknowledged that the Executive must be re-

sponsible to the people, a change was necessary in another respect. When the Executive Councillors were responsible to the Governor, there was no necessity for them to be Members of Parliament; there was indeed nothing in the law to prevent any Executive Councillor from being a Member of Parliament, and from the beginning one and generally more Executive Councillors had been of the Legislative Council. But when the Ministers were responsible to the House, it was necessary that some of them must belong to the House, while it was also necessary that there should be some representation of the Ministry in the Legislative Council to explain and justify government action to that House. Hence the system that every Minister must be a Member of one House or the other, of which there is not a word in the Union Act or any other Act.

With Canadian self-government admitted, still the old theory of Empire trade did not die without a struggle. Before the Union the home authorities kept the control of the trade relations of Canada in their own hands. When the Corn Laws were repealed, whereby colonial grain ceased to receive protection, the Colonies were ostensibly freed from the obligation to favor British goods in matters of tariff. When, in 1859, Canada determined to increase the duty on manufactured goods, the Sheffield cutlery lodged a protest. The Colonial Secretary sent the protest to Canada with a suggestion (to use a mild term) that the tariff should be modified. Galt, the Finance Minister, answered in effect that the Canadian Ministers were

responsible to the Canadian people, and "self-government would be utterly annihilated if the views of the Imperial Government were to be preferred to those of the people of Canada. . . .

The Imperial Government are not responsible for the debts and engagements of Canada; they do not maintain its judicial, educational, or civil service; they contribute nothing to the internal government of the country; and the Provincial Legislature, acting through a Ministry directly responsible to it, has to make provision for all these wants." The Colonial Office was supported by the Lords of Trade of the Privy Council, but nothing was done. Canada had made her financial Declaration of Independence, and her right to arrange her own trade and tariff policy has never since been challenged.¹¹

When the Dominion of Canada was formed in 1867, out of the existing Provinces of Canada, Nova Scotia, and New Brunswick, the Colonial statesmen who drew up the British North America Act, which was to give the contract between the Provinces legal validity, inserted in the preamble the desire of the Provinces to be united in one Dominion under the Crown of the United Kingdom, "with a constitution similar in principle to that of the United Kingdom." There is nothing in the Act to indicate anything but autocratic rule; the Executive government is vested in the Sovereign, who is Commander in Chief of Army and Navy, and who appoints a Governor General to carry on the government for him; the Governor General chooses, summons, and removes Privy Councillors, and he may

appoint Deputies to perform his functions; he selects Senators who may occupy a seat in the Senate for life, and he also appoints the Speaker of the Senate; no money bill can be passed without previous message from him recommending it; he may assent to a bill passed by both Houses or withhold assent or reserve it for the Royal pleasure; the Sovereign may, even after the assent of the Governor General, disallow a bill within two years of its receipt; the Governor General appoints the Judges, etc., quite in the orthodox way. There is not a word in the Act about the Cabinet or the Ministry, and nothing to indicate that every Minister must be a Member of Parliament, no suggestion of responsibility of anyone to the House of Commons or to the people. No stranger to our institutions, reading this our "written constitution," could have the faintest notion of our real constitution.

We have a House of Commons elected at least as frequently as once in five years by the people, a Prime Minister and other Ministers selected in any convenient way by the dominant party, that "Cabinet" selecting Judges, Senators, etc., and directing the policy of the country until they lose the confidence of the House, the Governor General signing papers put before him and taking no part in the actual governing of the Dominion. The same thing can be said, *mutatis mutandis*, of the government of the Provinces. Governors are now so called on the *lucus a non lucendo* principle because they do not govern,¹² but they have all the outward appearance of governing as fully as in the earliest Colonial times.

In 1878 an occasion arose for expressing in the plainest terms the self-government of Canada in her own matters. In that year, protection became an issue in the general election, the "National Policy," as it was called. The cry was successful. Sir John A. Macdonald had a majority of the members of the House of Commons returned to support him. A protective tariff was introduced and passed. When it was objected on both sides of the Atlantic that such a policy would be fatal to British connection,¹³ the Prime Minister in his place in the House of Commons calmly said: "So much the worse for British connection."

In 1887 was held the first Colonial Conference of the Prime Ministers of the Old Land and of the self-governing Colonies, to consult concerning matters affecting the Empire at large. Thus Canada, having achieved her own self-government, took part in advising in matters affecting the remainder of the British world, another very important if apparently insignificant step in her progress. When the Washington Treaty in 1871 came to be negotiated Sir John A. Macdonald, the Prime Minister of Canada, was appointed by the Imperial Administration one of the British commissioners, nominally to represent Britain, in fact to represent Canada. In the Treaty, Article 33 provided that Articles 18, 25, and 30, affecting Canada, should not come into effect until laws were passed by the Parliament of Canada to carry them into effect. The Imperial Government undertook to urge upon the Dominion

that no export duty should be levied on timber in certain territory in Maine, but did not undertake that the Dominion would respond favorably, nor was there any interference with freedom of legislation, etc.

In 1896, a general election returned a majority in support of (Sir) Wilfrid Laurier. The Liberal Party, led by Laurier, had for some years advocated a reduced duty upon British goods. The Laurier Administration introduced and passed a bill which would have the effect of materially reducing the customs duty on British manufactures.¹⁴ There was a known difficulty in the way. Britain had treaties with Germany (1865) and Belgium (1862) which prevented her Colonies giving her preferential treatment in the way of customs duties. Efforts had been made by Canada from 1892 to have these treaties abrogated as interfering with the fiscal independence of the Colonies, but these efforts were in vain. Laurier's tariff preference was admittedly illegal unless he could succeed in having the treaties denounced. He crossed the Atlantic in 1897 to attend the great Jubilee Celebration of the sixtieth anniversary of Queen Victoria's accession to the throne. He attended the Colonial Conference and urged the denunciation of the German and Belgian treaties, and denounced they were.¹⁵ Thus Canada insisted upon complete liberty in respect of her tariff and procured a reversal of British trade policy so far as it affected her.

Canadians and others got tired of being called "Colonials." It was recognized that the status of Colony had

gone, and in 1907 the Colonial Conference disappeared, to give way to the Imperial Conference.

Then came the war. Canada did not delay a minute, but the message went at once to London "the last man and the last dollar." In a few weeks Canadian troops were at the front and reinforcement followed reinforcement, until our little nation had half a million men under arms to fight for democracy and freedom. Canadians have fought for Britain almost ever since Canada was British. They were to be found on every stricken field since Waterloo and before, in the Peninsula, the Crimea, at Kars, Egypt—where not? But they fought as British troops armed and paid by Britain. In this war, Canadians fought as Canadians, uniformed, armed, paid by Canada, looked after by Canadian doctors and nursed by Canadian women, the disabled pensioned by Canada. Our troops were Canadian troops. Canadians were dying by thousands, and it was recognized that Canada should have something to say as to how the war was to be carried on. And in 1917 the War Cabinet was formed. As this Cabinet was an anomaly even in our anomalous British world, I think I should show its origin, composition, and functions in the words of those who know.

The Hon. N. W. Rowell, when President of the Council, speaking in the House of Commons at Ottawa said of the War Cabinet: "In 1917 the Prime Minister of Great Britain called together the Ministers of the self-governing Dominions for consultation on vital matters of policy relating to the prose-

cution of the war. They met as equals—as Prime Ministers of the nations of the Empire, to discuss matters of common concern to the whole Empire. Great Britain recognized that, with the growth of power and influence of the Dominions, the time had come when the Government of Great Britain should frankly recognize that the Dominions had ceased to be in any sense states dependent upon the Mother Country, and had become sister nations, standing on an equality with the Mother Country."

Sir Robert Borden, the Canadian Prime Minister, said at the meeting of the Imperial Council in 1918: "A very great step in the constitutional development of the Empire was taken last year by the Prime Minister, when he summoned the Prime Ministers of the Overseas Dominions to the Imperial War Cabinet. We meet there on terms of perfect equality. We meet there as Prime Ministers of self-governing nations. We meet there under the leadership and the presidency of the Prime Minister of the United Kingdom. After all, my Lord Chancellor and gentlemen, the British Empire, as it is at present constituted, is a very modern organization. It is perfectly true that it is built up on the development of centuries, but as it is constituted today, both in territory and in organization, it is a relatively modern affair. Why, it is only 75 years since responsible government was granted to Canada. It is only little more than 50 years since the first experiment in federal government—in a Federal Constitution—was undertaken in this Empire. And from that we went on, in 1871, to representation in negotiating our commercial treaties,

in 1878 to complete fiscal autonomy, and after that to complete fiscal control and the negotiation of our own treaties. But we have always lacked the full status of nationhood because you exercised here [in England] a so-called trusteeship, under which you undertook to deal with foreign relations on our behalf, and sometimes without consulting us very much. Well, that day has gone by. We come here, as we came last year, to deal with all these matters upon terms of perfect equality with the Prime Minister of the United Kingdom and his colleagues. Every Prime Minister who sits around that board is responsible to his own Parliament and to his own people; the conclusions of the War Cabinet can only be carried out by the Parliaments of the different nations of our Imperial Commonwealth. Thus each Dominion, each Nation, retains its perfect autonomy. I venture to believe, and I thus expressed myself last year, that in this may be found the genesis of a development in the constitutional relation of the Empire which will form the basis of its unity in the years to come."

And the War Cabinet in its official report for 1918 said: "The common effort and sacrifice in the war have inevitably led to the recognition of an equality of status between the responsible governments of the Empire. This equality has long been acknowledged in principle, and found its adequate expression in 1917, in the creation, or rather, natural coming into being, of an Imperial War Cabinet as an instrument for evolving a common imperial policy in the conduct of the war. The

nature of the constitutional development involved in the establishment as a permanent institution of the Imperial Cabinet system was clearly explained by Sir Robert Borden in a speech to the Empire Parliamentary Association on the 21st of June, 1918."

It was natural, then, that when the Treaty of Peace came to be negotiated, Canada, as well as the other self-governing Dominions, should be represented, and that she should sign the treaty as a contracting party. General Smuts, the Prime Minister of the South African portion of the British Empire, truly said that the most important thing about the treaty was the signatures at the end of it. He continued: "For the first time in history, the British Dominions signed a great international instrument, not only along with the other Ministers of the King, but with the other Ministers of the great powers of the world; and although the tremendous importance of this great act has not been fully recognized, there is no doubt that the treaty, signed as it has been with parties to it not only representative of the King in the British Isles, but in the Dominions, forms one of the most important landmarks in the history of the British Empire. The British Dominions did not fight for status. They went to war from a sense of duty, from their common interest with the rest of the world in vindicating the great principle of free human government. Not only has victory been achieved for the objects for which they fought, but what for the British Dominions is equally precious, they have achieved international recog-

dition of their status among the nations of the world. In a large sense this world is one of small nations, and certainly none of those had had larger results accruing to them from this war than the young nations of the British Empire. They have deserved this through the magnitude of their efforts. It has been proved and has never been challenged that two of the British Dominions, Canada and Australia, made a greater war effort than any other powers below the rank of first class powers. Their achievements have been outstanding ones. Australia alone lost more than the United States of America. They [i. e., Canada and Australia] have of course lost heavily; they are handicapped with enormous debts; but they have at any rate emerged with victory, honor, and a new standing in the world, in that they are internationally recognized today. No wonder after what has been done, their great performance all through the war, and especially towards the end of it, that the other powers and nations of the world are only too willing to welcome and recognize them within the great new family. It took some time for the position to be realized at Paris, because so many of the powers were under the impression that everything seemed to be under the tutelage of the British Parliament and Government. They could not realize the new situation arising, and that the British Empire, instead of being one central government, consisted of a large league of free states, free, equal, and working together for the great ideals of human government. It was difficult to make people appreciate this, but afterwards

they fully applauded, and their approval was given as embodied in this international document."

It has commonly been believed in the United States that the status of Canada and the other Dominions was due to the intrigues or at least to the wishes of the British. Nothing can be more erroneous; Canada, Australia, South Africa, demanded their rights without regard to any other consideration, and their claim was allowed. Nor did the Dominions trouble themselves much about the wishes of Britain. Japan, with the backing of both Britain and the United States, found herself checked by Australia; and the stand taken by Canada's representatives in the League of Nations in respect of natural resources has been from an American point of view (I use the word in its geographical sense, in which Canadians and Americans are alike American.) Canada has had as much and as honest objection to Article X as the Republican Senators at Washington, and would fain have it expunged from the Treaty.

The new status of the Dominions is recognized by every important nation in the world except the United States. The statesmen in England have no misconceptions on the matter. Viscount Milner says: "No international conference is really complete in these days unless the British Dominions are represented. It is absurd to suppose . . . that the presence of Canada and Australia in international discussions is not at least of equal importance with that of Chile or the Argentine, Bolivia or Paraguay." (Shall I be considered

discourteous if I add "or Nicaragua or Cuba or Panama or Hayti"?) Mr. Winston Churchill says that: "So far as the Dominions and the British Empire were concerned, the new principle developing was the common consultation among members of the British Empire regarding difficulties of any one of them. No decision concerning the status of one nation of the Empire could be taken in a final way without consultation between the whole body of the Empire. The Dominions would share with the Motherland in the responsibility of dealing with great dominant questions and decisions which affected the common fortunes of the whole body."

NOTES.

¹ Let no one imagine that by the use of this word "camouflage" a Canadian shows contempt for the British Constitution. He loves it, admires it; but it is his own, he plays with it, laughs over it, and has no feeling of awe in discussing it. He does not worship it, though indeed he might do so without breaking the Second Commandment, for it is not the "likeness of anything that is in heaven above or that is in the earth beneath or that is in the water under the earth."

² Mackenzie's rebel forces were scattered at Gallows Hill, up Yonge Street, Toronto, in December, 1837. The City of Toronto has another battle ground within its limits, from Sunnyside to the Old Fort which took vengeance in 1813 on the American invader by exploding and killing General Zabulon Pyke and many of his troops.

³ I once read an account of Canadian affairs written as a thesis in an American university which showed such an entire misapprehension of everything Canadian that I made inquiry as to the source of the information contained in it. I was informed that it was all derived from Lord Durham's Report, the student imagining that what was true of the fourth decade of the Nineteenth Century remained true of the second decade of the Twentieth.

⁴ This is on a par with that delightful bit of camouflage in the Established Church of England. By the Statute (1533) 25 Henry VIII, c. 20, s. 4, it is enacted that the King, on a

vacancy in a bishopric, may send to the Dean and Chapter of the Cathedral a license (the *congé d' église*) to elect and choose a bishop. With this license is sent a "letter missive containing the name of the person whom they shall elect and choose," that is, the Dean and Chapter may elect and choose anyone as bishop, so long as it is the person named in the letters missive. A year or two ago, certain members of a Chapter talked about electing some other than him named in their letters missive. It ended in talk. An American will understand such camouflage if he thinks of his own Electoral College, who may elect any one of the millions of qualified American citizens so long as they elect the one for whom they have the informal letters missive of the dominant party. If they did not, they might possibly be lynched and would deserve to be. Whether a means could be found to deprive the elected of the Presidency—*quien sabe?* But remembering 1876, *nil desperandum Senato duce*.

⁵ The defeated Prime Minister may of course claim an election to enable him to procure his majority; if he fails, he goes.

⁶ The language of the late Hon. Israel Tarte, speaking of the Canadian Cabinet, of which he was a prominent member.

⁷ There were a few minor matters of no great importance which may be excepted; I am speaking generally in the text.

⁸ He conceived the extraordinary idea that what the House claimed was republicanism, that the contest was between republicanism and monarchy, disloyalty and loyalty, annexation to the United States and union with Great Britain; he in a word, imagined that he was in Upper Canada to rule it, wholly forgetting that in England the Sovereign had ceased to rule and had become content to reign, that the sole responsibility of Ministers to the Head of the State has its most striking example in the Great Republic and is unknown in the Great Monarchy. He may, however, be pardoned, for no less a person and no less renowned a reformer than Lord John Russell was quite sure that to grant to the Colonial Legislature almost the powers of the British Parliament would lead at no distant date to a dissolution of the Empire.

⁹ For a full and accurate account of Sir Charles Bagot's administration, see the very interesting and valuable paper, "Sir Charles Bagot," by Professor Morison of Queen's University, Kingston, Ontario (Bulletin No. 4 of the Departments of History and Economic Studies in Queen's University).

¹⁰ As it is put by Professor Skelton in his admirable "Life and Times of Sir A. T. Galt," Toronto, 1920, at page 325: "The control which the British Government exercised over Canadian internal affairs steadily faded to the

mere memory and shadow of authority. The power to make and amend the Constitution of the Province was used in accordance with Colonial and not with British wishes. . . .

The power to bind the Colonies by positive laws fell into disuse and the negative veto in provincial laws was used with increasing caution. The Governor, the representative of the British authorities on the spot, became a quasi-constitutional monarch exercising influence rather than power. . . . The Governor ceased to attend the Council's meetings regularly, and did not learn of its transactions until the minutes were presented for his approval. The tradition runs that upon one occasion Macdonald politely showed Sir Edmund Head (1854) the door. . . . The Executive Council had developed its own leader from within."

¹¹We shall find a grumble from England and a snub if not a defiance from Canada later in 1878.

¹²Was Woodrow Wilson so named because he wouldn't row but would insist upon steering? If so, he is like our former Governors.

¹³When Francis Hincks introduced his tariff in 1849, he said that a protective tariff would be equivalent to a declaration of independence. He quoted Earl Grey, who asked what inducement England could have to keep up any connection with Canada if shut out by a heavy tariff from Canadian markets—the old Empire point of view.

¹⁴In form the Act (1897) 60, 61 Vict., c. 16, s. 17 (Can.) favors all countries whose tariff admitted the products of Canada on terms as favorable on the whole as the reduced Canadian tariff. In fact, it was Britain alone that was to be favored, and every one knew it.

¹⁵The Belgian Treaty is that of London, July 23, 1862, 11 *Herstlet's Treaties*, covering "dominions and possessions of the two High Contracting Parties." On page 70, Art. XV, "articles the produce or manufacture of Belgium shall not be subject in the British Colonies to other or higher duties than those which are or may be imposed upon similar articles of British origin." The German Treaty is that of Berlin, May 30, 1865, 12 *Herstlet*, 761.



THE PRESENT POSITION OF CANADA

BY

HON. WILLIAM RENWICK RIDDELL

Justice of the Supreme Court of Ontario,
Toronto, Canada



An address delivered at the Sixteenth Annual Meeting of the
ASSOCIATION OF LIFE INSURANCE PRESIDENTS
At New York, December 7, 1922



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The death-blow to the British Empire was struck in Canada on that afternoon on the Plains of Abraham when Wolfe died victorious, rejoicing because he was told, "The enemy run." I say the British Empire received its death-blow upon that day, but I mean the old British Empire, the British Empire which was built upon the model of the Roman Empire; and again I mean the old Roman Empire, not the Holy Roman Empire, which, as you know, is so called because it was not holy, was not Roman, and was not an empire.

The old Roman Empire was built upon the principle that Rome was the important part of it. The outlying parts of the Empire, the colonies and the provinces, existed for the sake of Rome and that part of it which lay in the immediate vicinity of Rome. That was the theory on which the old British Empire was built. The colonies existed for the sake of the mother country.

Some of you are old enough to remember the Cobden slogan: "Ships, colonies and commerce." That would have been gross pleonasm in the old British Empire. Commerce was sufficient, ships were only of advantage in that they prevented other nations from capturing the commerce of Britain. They acted as the vehicles for carrying the commerce throughout the world. It was the commerce of the Kingdom which was always in view and the colonies were looked to simply in order to increase the commerce of the Empire.

In other words, the British Empire was built upon the principle, "Everything for Britain—colonies and the rest of the world."

It is well, then, that the foundation of the new British Empire,

which is just being completed today—or yesterday—by the new Dominion of the British Empire which is bound to be one of the brightest stars in His Majesty's Crown, one of the brightest stars in the galaxy of nations constituting the British Empire—I mean the Free State of Ireland, which came to its own yesterday, should have been formed in Canada. It was built upon the model of Canada, and it was Canadians who worked out the principle and the model of the new British Empire. It would be impossible for me, in one address, or in twenty addresses, to give you anything like a detailed account of the evolution whereby the old British Empire passed into the modern British Empire. It was almost entirely the work of Canada. The best I can do is to give you an outline of the work of my Province of Upper Canada, whereby you would be able to see the evolution, to understand how the British Empire is as it is and how the British Empire, the old British Empire, no longer exists and can never come into existence again.

When Quebec was conquered, when Canada was conquered, with some of the islands in the Carribean Sea, in 1760—it was a question for a long time as to whether or not Guadeloupe should be taken and Canada given back to France, because Guadeloupe exported 300,000 pounds sterling worth of sugar every year, whereas Canada was but “a few arpents of snow.” Had it not been for the efforts of Benjamin Franklin, who was at that time representative at the Court of St. James for the Province of Pennsylvania, Canada would have been given back to France. I think, while I am on that subject, there is talk about the United States giving some hundreds of millions of dollars for Guadeloupe. Don't take it; I have seen Guadeloupe.

What was the American Revolution? The American Revolution was not like the French Revolution, whereby, after the revolution was over, France was no more like the France before the revolution than France and Flanders after the Germans retreated were like France and Flanders before the Germans invaded. Courts functioned regularly. There was a change in form, but in substance the American states were almost entirely like the American colonies. The principle of democracy, which had been implanted by Englishmen in this continent, continued and I have often said, sirs, that those embattled farmers who stood at Concord, with a line uneven, owing little to the drill sergeant, but much to the strong heart, men who fired the shot that was heard around the world, fought, not only for themselves, not only for the 13 colonies and the 13 states and the 48 states which were to follow, not only for themselves and for their

descendants, but for Canada and Australia, and New Zealand and South Africa—yea, for England itself and all that makes the British Empire worth while.

Democracy was well established in the old country before George Washington was born. Nobody supposes for a single moment that democracy was born upon this continent, or originated in the United States, or that the 4th of July, 1776, was its birthday. While the American colonies were perfectly justified in fighting as they did for liberty, or self-government, there was a large class of colonists who believed that they ought to remain in connection with the mother country. They were like those splendid men, the cavaliers, in the early part of the 17th century. They were like the Jacobites in the early part of the next century and later on in the same century, who stuck to James the 2nd; like those Jacobites who, in 1715-1745—my own ancestors amongst them, by the way—who followed Prince Charles in order to restore the Stuarts to the throne. They believed in abiding by the faith that they had sworn, and they believed that by exercising their power of petition in a constitutional way they could work out their political salvation and achieve the rights to which they were entitled.

There was no right and wrong about it. It was a matter of policy, whether you shall do as the Roundheads did, as the American colonies did, fight at the time for what you desire, or work it out as we have done and as the Cavaliers believed they could do—probably unwisely—as the Jacobites believed they could do, by working it out constitutionally. These men who left in 1783, after the recognition of the independence of the United States and crossed over into Canada, were not slaves. They were free men. There were two principles that the United Empire loyalists brought with them into this province: "We will never give up the old flag", "but we must and will govern ourselves"; and these two principles are today in as vigorous life and effective activity as a century ago. The Tories were men of the highest principle who

" . . . kept their faith

To England's crown, and scorned an alien name,

Passed into exile; leaving all behind

Except their honor . . .

Not drooping like poor fugitives, they came

In exodus to our Canadian wilds,

But full of heart and hope, with head erect

And fearless eye, victorious in defeat;

With thousand toils they forced their devious way
Through the great wilderness of silent woods
That gloomed o'er lake and stream, till higher rose
The Northern Star above the broad domain
Of half a continent, still theirs to hold,
Defend and keep forever as their own,
Their own and England's till the end of time."

The United Empire Loyalists spread into Upper Canada and the rest of Canada, with the exception of a certain part of Quebec, the two principles upon which Canada has grown, and which Canada treasures today, more than she ever did in the whole course of her life, and these are:

"We shall not give up our flag, the flag that braved a thousand years the battle and the breeze. We shall not give up our share of the traditions of the race. We shall not sever ourselves from the centuries of glory which the British flag has seen and which Britain has seen, and in which Britain has fought and conquered. We shall remain British."

"We shall govern ourselves. We will submit to dictation from no nation on the face of the earth, this side of the Atlantic or the other."

It has been upon these two principles that the Loyalists for 25 years were busy carving their way out of the primeval forests, making life easier for themselves than they had in the past, men who had left behind them all their goods. They were desirous of making life easier for their children and themselves. They were too busy to bother themselves to see how the country was being governed. The country was then a monarchical country such as the United States is today. We have got past that. We believe in a King who reigns but does not rule. The people rule. I understand that you believe in a captain running the ship. Royal governors were sent out in those early days to govern. They were responsible for the government of the country. They looked after the legislation. They appointed the ministers to the Crown. England herself, for over 25 years, put her hand in her own pocket and paid every dollar for the protection of Upper Canada, for the administration of Upper Canada. She paid the judges, sheriffs, surveyors and every officer in Upper Canada out of her own pocket. The settlers built a few roads and they used to pay their legislators wages—the name wages being actually used—because, I understand, that even in your country people will not go to Congress or other posts unless they get paid

for it. At all events, our legislators would not. But Britain paid for the protection and administration of our provinces without a dollar being contributed by Canada.

When, in 1817, Upper Canada began to pay a little of her own expenses there occurred a change. You know if a man is building a road by the side of your house and paying for it out of his own pocket, you don't very much bother about who is superintending it. You don't bother yourself very much about the road when the man is paying for it himself. But suppose he is using your money? Then the story is different; and that is what happened in Upper Canada. When Upper Canada was paying some money towards her own administration, she insisted upon having some say in the appointment of those who had the spending in charge, and she went on for twenty years in that way until there was a rebellion in 1837, aimed at responsible government.

Canadians are natural born kickers. Why shouldn't they be? They are a free people. It is the right of free men to kick, and free women to doubly kick, for that matter. God help that people who, when they see the sign "Verboten," obey. You know what happened to the nation that did that.

In our country, I mean on this Continent, if you see a sign "Keep off the grass," that is a tacit invitation to cross it.

"Obey little," says Walt Whitman. Canadians are natural born kickers, but there is one thing they will not do—they will not submit to anybody telling them or compelling them to leave the protection of the flag under which they were born.

William Lyon Mackenzie desired to tear Upper Canada from the British Empire. The Governor sent down every British soldier out of Upper Canada, and Upper Canada put down the rebellion itself.

Britain had been obliged to depend upon the reports of her Lieutenant-Governors, and they being over in the Provinces for only two or three years had to depend upon the reports made by their executive councillors, who had the spending of their money, and everything was for the best, in the best of all colonies. But when Britain found out that there was a rebellion, they knew something was wrong and they sent out to this Province a man of the highest standing and one of the greatest statesmen they ever produced—I mean Lord Durham—and he recommended responsible government.

What is responsible government? Responsible government is this: At certain times the voters in our Province elect gentlemen to rep-

resent them in the House of Assembly. These members of the House of Assembly, by some direct or indirect method, select a Prime Minister. He selects his Ministers. These men have to account to the people they represent for every dollar that they spend. They have to account for their every act. They can only remain in power so long as they can get a majority in the House of Assembly. The moment they cannot they have to get out and let someone else be Minister who can. No one can understand the Constitution of Canada who believes what he reads. No one can understand the Constitution of Canada who takes it at its face value, who believes what it says in black and white. In the British Constitution, as in our Constitution, if you see anything that is utterly beyond question, beyond any possible cavil, you may be quite certain that it is not so.

Let me give you a few examples. The King is King by the Grace of God. Every writ says so. We know, everybody knows, and he knows and he is proud of it, that he is King by grace of an Act of Parliament, the "Act of Settlement." He is King by the Grace of God in the same way that I am speaking to you by the Grace of God and that you are patient enough to hear me, by the Grace of God. The King is head of the Army and Navy, and he cannot appoint a midshipman or a lieutenant. The King can take any one of the 600,000,000 British subjects throughout the world as Prime Minister, so long as he takes the one selected by the House of Commons, and the other day it was even more anomalous than it is today, he was King of the United Kingdom of Great Britain and Ireland.

Now, our governors are precisely in the same position. The Lieutenant-Governor in the Province of Ontario and the Governor-General in Ottawa, have the functions of the King. The King is the only man in the Great British Empire that has nothing to do with and cannot have anything to say about the legislation that is going on in the House of Commons or in the House of Lords. He has no right. It is unconstitutional. You won't find that anywhere in black and white. The Governor-General is the only man that cannot say a word about the legislation in Ottawa. If he did it he would lose his job. The Lieutenant-Governor in Ontario is the only person that cannot say a word about the legislation that is going on in the House of Assembly in Ontario. You cannot find anything like that in the statutes. The statutes, on the contrary, say the Lieutenant-Governor selects the Ministers. The Lieutenant-Governor does that exactly the same way as the King picks out his Ministers. He takes those that are selected for him, and that is all there is to it.

Governors are so called because they do not govern. Our governors are governors on the same principle that they called a stream on my father's farm "Trout Creek," because there are no trout in it. Perhaps you Americans will understand it better if I were to explain by saying, on the same principle that Woodrow Wilson got his name because he would not row but insisted upon steering.

Our Governors are the only people who have nothing to say about legislation. All they can do is to "sign on the dotted line." The King appoints ambassadors, and he only sees them once, when they come to kiss hands. I was appointed by the Governor-General, and the Governor-General never saw me and I never saw him, and I didn't want to see him. I was appointed by the Ministry. Our Ministry must take the responsibility. That is responsible government. They must take the responsibility for every appointment. There is no confirmation of appointments such as you have in your Senate. They make appointments for which they are responsible to the House of Commons, the people's representatives.

I compare that with your system. I said you are monarchical. You say you have elected monarchs. So had Poland. You elect a President and if he is not boss you raise a row about it. Your idolized presidents were the most powerful presidents. Did they not take a hand in the legislation? What would be said of a President of the United States who could not say a word about proposed legislation? What about your Governor at Albany? Would any one of those Governors have a kind of governorship that our Governors have? They are merely ornamental. We do not believe in one-man government and we don't have it. We believe in democracy, the government of the people, and if you think you are more democratic than we are then I will let you argue it sometime when I am not here.

Responsible government, then, was brought into force in Canada in 1841 by the Union Act, when the two provinces of Lower and Upper Canada were united, but there was constant interference with our legislation at the hands of English people who simply could not get it out of their minds that it was the old British Empire, existing for the sake of the British people, the colonies existing for the sake of the Empire.

In 1858 there was an interference with one of our tariffs, and the Finance Minister said to the people in the old country, "You are asking us to be responsible to the English people. We will not do it. We are responsible to the Canadian people. So long as we satisfy

the Canadian people, then we retain our offices, but if you insist upon us having a different tariff, we resign."

Well, that went on, and, in 1867, we formed the Dominion. In 1878 there was a Declaration of Independence, of which I dare say you have never heard. In 1878 there was an election, which was called the National Policy Election, where it was suggested to put on heavy customs duties, upon the goods of all countries, including Britain. Well, at that election, Sir John A. Macdonald, who was the Prime Minister, succeeded in putting heavy duties on all goods, English included. Representation was made by the English manufacturers that that was bad for British connection. The Government had been told, some years before, to mind their own business, and they did mind their own business, but there was some talk in Canada about that being bad for British connection, so Sir John stood up in his place in the House of Commons and said, "If that is bad for British connection, so much the worse for British connection," and we have had no more such talk as that. There has never been a moment's interference since then with our right to put on just what duties we saw fit.

Now, this step taken made Canada absolutely independent in every matter connected with Canada, but there was more than that to do, and in 1887 the Colonial Conference was formed. That is the conference between the Prime Minister and the Prime Ministers of the various colonies, who get together occasionally and discuss the affairs of the Empire, and now Canada is helping Britain to decide what it shall do in matters connected with the Empire.

In 1896, a still further advance step was made. That election was run upon the cry, "British preference"—that is, place less duties upon British goods than upon goods coming from the rest of the world. Sir Wilfrid Laurier was Prime Minister when that was passed. Germany and Belgium had treaties whereby they were entitled to the lowest tariff given to any country, in Britain and her dependencies. Canada was a dependency of Britain. Technically and legally and under international law she is a dependency today, a dependency upon the same principle that governors govern, she is independent in another sense, but technically and legally that is so—and Germany and Belgium objected. I thank God that in all the glorious history of Britain, unlike her perfidious enemies—that in all the years of Britain's history, she has never said that a treaty is "a scrap of paper."

It was recognized that these were treaties and that they must be

obeyed and they were obeyed. When Sir Wilfrid went across to the Colonial Conference the next year he said, "These treaties must come to an end. Canada has no part in making them. Canada is going to look out for her own tariff." And these two treaties were denounced. Canada told Britain to denounce the treaties and they were denounced.

Belgium quit and Germany said, "If you do not give us the same duties as Britain we will put a surtax on." Canada said "All right, we will put a surtax on all your goods," and after a little while Germany lay down and we heard no more of it and since that time there never has been a treaty made by Britain which affects Canada without the consent of Canada being had by means of its Parliament.

In 1907 another step in advance was taken. We got tired of being called "colonial." I never allowed myself to be called a Colonial. I am a Canadian. I was born in the Dominion and I am a Canadian. Australians got tired of being called colonial, and the name of the conference was changed to the Imperial Conference—the conference of the Empire.

Then came the war. When that tiger-spring was made across the Rhine, when crucified Belgium and tortured France cried across the channel, aid came. Canada did not delay a moment. In less than six weeks 30,000 Canadians were on the Atlantic to fight for civilization and democracy. Our men were dying by hundreds and thousands. It was thought Canada ought to have a say who should lead our men, how they should be led, where they should be led, and the War Cabinet was formed. The War Cabinet was a cabinet formed of the prime ministers of Great Britain and the Prime Ministers of various Dominions acting in London and outside which determined where all British troops and where troops from Australia and New Zealand and all the other dominions should fight. And it was admitted by all sides that they met on an equality, and they did meet on an equality.

Mr. Cosgrave, the president of the present Irish Free State, is absolutely right. I read from this morning's paper—First, he emphasizes the fact of changes having taken place to take the will of the Irish people without the domination of any people on earth. Cosgrave recommended this status for the representation of the Irish people, the absolute equality. We stand on equality. We legislate for our own country, each for all and all for each, and that is the present status of Canada.

They are talking about the appointment of an ambassador at Washington. We will appoint one when we want to.

Now, what of the future?

I walked a mile with Pleasure;
She chattered all the way.
But she left me none the wiser
For all she had to say.

I walked a mile with Sorrow
And never a word said she;
But oh! the things I learned from her
When Sorrow walked with me!

We have been walking with sorrow. Many of our Canadians are dead. There is hardly a house in Toronto in which there is not weeping for one who is dead. We were walking with pleasure but we have learned through deep sorrow what is real. I think Canada has passed through that state and we know its glorification.

Canada has learned that it is not an enormous army, it is not a powerful navy, not arrogance nor over-bearing pride, but righteousness that exalteth a nation. It is righteousness that has guided your nation and mine these years. Is the old story to be told all over again, peace, wealth, arrogance, insult, war? "Watchman, what of the night?" And the answer came "The morning cometh and also the light."

Will the answer ever be, "The morning cometh and there will be no more night?" The answer to that depends upon the American people. A short time ago a drama was being played in Washington which was watched with bated breath by the nations of the world as to whether the United States should join the League of Nations. I refused to get excited over it. I knew in my heart that the peace of the world, the future of civilization depends not on any league of other nations, but on a league of English-speaking peoples.

If those two peoples stand together, march together, and, if necessary, fight together, peace is secure, and civilization cannot fail; but, once they are apart, woe unutterable!

Some of these days one nation shall not raise sword against the other. That day can only come by a union of heart, a union of sentiment, a union of object, by the democratic English-speaking nations of the earth. There may be no formal treaty. I do not know whether that is wholly desirable, but there will be that which is stronger than

parchment bond, more efficient and efficacious than anything written by steel or golden pen. There will be that which comes from very nature itself, by the law which proceeds from the very throne of God, by that law which is more powerful than any of the physical laws which the Creator has impressed upon his universe, that moral law that like must seek like. It must be under that law that people of the same sense of justice, with the same feeling for right, with the same ardor and burning for righteousness, must stand together, must see together, and must, if necessary, fight together and that being so, the peace and civilization of the world are secure.

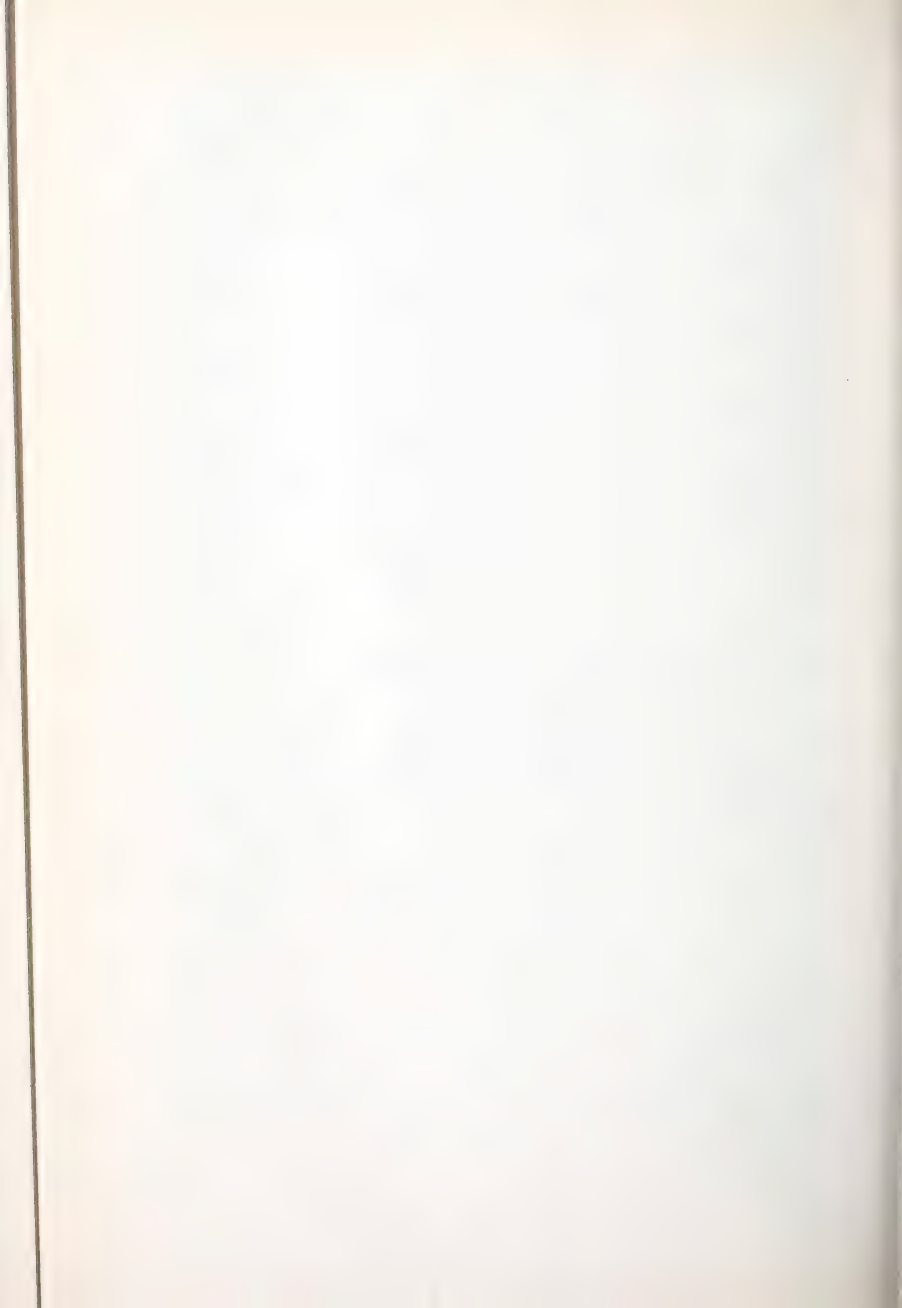
My nation stands ready to join with you in every movement in that direction. While Canada stands square to all the winds of heaven, perfectly able and willing to stand by herself alone if she must, she desires the good will, affection and respect of all the nations of the earth, and of this great nation which has been her great brother for more than a hundred years. We desire that peace which you men desire. We desire that union which you men desire, and it is to that union that I apply the words which your chairman so eloquently used this morning, the familiar lines of Longfellow :

“Sail on, O Union, strong and great !

* * *

Sail on, nor fear to breast the sea !
Our hearts, our hopes, are all with thee,
Our hearts, our hopes, our prayers, our tears,
Our faith triumphant o’er our fears,
Are all with thee,—are all with thee !”

It is that union for which all Canadians pray ; it is that union which I think all right feeling Canadians look forward to as the true millennium.



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THE ASSOCIATION FOR THE STUDY OF NEGRO LIFE AND HISTORY, INCORPORATED

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A VALUABLE BOOK

The Education of the Negro Prior to 1861

The History of the Education of the Colored People of the
United States from the Beginning of Slavery to the Civil War

BY

CARTER GODWIN WOODSON, Ph. D.

(HARVARD)

460 pp. \$2.00; by mail \$2.15

"This book is neither a controversial treatise on Negro education nor a study of recent problems. Dr. Woodson has given us something new. He has by scientific treatment amassed numerous facts to show the persistent strivings of ante-bellum Negroes anxious to be enlightened. What they accomplished is all but marvelous."

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The titles of the chapters are: "Introduction," "Religion with Letters," "Education as a Right of Man," "Actual Education," "Better Beginnings," "Educating the Urban Negro," "The Reaction," "Religion without Letters," "Learning in Spite of Opposition," "Educating Negroes Transplanted to Free Soil," "Higher Education," "Vocational Training," "Education at Public Expense." In the appendix are found a number of valuable documents. The volume contains also a critical bibliography and a helpful index.

OPINIONS

"I like it very much. You seem to have loosened up on your style a bit and you have done an excellent piece of research. . . . I hope that your book will have a good sale."—*Edward Channing, McLean Professor of Ancient and Modern History Harvard University.*

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. . . The book, as a whole, is an illumination of the recent development of education among the colored people."—*The Washington Star.*

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THE JOURNAL OF NEGRO HISTORY

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Agents Wanted

The following incident has often been told in Mr. Ray's family. "One summer morning, a loud rap with the knocker at the front door arrested the attention and the door being opened, a man entered, who after asking, 'Does the Rev. Mr. Ray live here?' and receiving an affirmative answer, whistled as a signal to attract the notice of his comrades, then cried out, 'Come on, boys!' and forthwith fourteen men in all entered, quite alarming the inmates of the house on seeing such a train of fugitives."

In the midst of these busy days Mr. Ray also served as a minister. For twenty years he was the pastor of the Bethesda Congregational Church in New York City where many learned to wait upon his ministry. He lived until 1886, long enough to enjoy some of that liberty for which he so patiently toiled. His more valuable services to his race, however, were rendered during the period prior to the Civil War. Although in the midst of this struggle of the subsequent period there came forward men who towered higher in the public opinion than he did, the valuable work which he did as an abolitionist, and an editor, should not be neglected.

M. N. WORK

THE SLAVE IN UPPER CANADA*

The dictum of Lord Chief Justice Holt: "As soon as a slave enters England he becomes free"¹ was succeeded by the decision of the Court of King's Bench to the same effect in the celebrated case of *Somerset v. Stewart*² where Lord Mansfield is reported to have said: "The air of England has long been too pure for a slave and every man is free who breathes it."³

James Somerest,⁴ a Negro slave of Charles Stewart in Jamaica, had been brought by his master to England "to attend and abide with him and to carry him back as soon as his business should be transacted." The Negro refused to go back, whereupon he was put in irons and taken on board the ship *Ann and Mary* lying in the Thames and bound for Jamaica. Lord Mansfield granted a writ of habeas corpus requiring Captain Knowles to produce Somerest before him with the cause of the detainer. On the motion, the cause being stated as above indicated, Lord Mansfield re-

* This paper has appeared in *Transactions of the Royal Society of Canada*, May, 1919.

¹ Per Hargrave *arguendo*, *Somerset v. Stewart* (1772), Lofft 1, at p. 4; the speech in the State Trials Report was never actually delivered.

² (1772) Lofft 1; (1772) 20 St. Trials 1.

³ These words are not in Lofft or in the State Trials but will be found in Campbell's *Lives of the Chief Justices*, Vol. II, p. 419, where the words are added: "Every man who comes into England is entitled to the protection of the English law, whatever oppression he may heretofore have suffered and whatever may be the colour of his skin. 'Quamvis ille niger, quamvis tu candidus esses' " and certainly Vergil's verse was never used on a nobler occasion or to nobler purpose. Verg. E. 2, 19.

William Cowper in *The Task*, written 1783-1785, imitated this in his well-known lines:

"Slaves cannot breathe in England; if their lungs
Receive our air, that moment they are free.
They touch our country and their shackles fall."

⁴ I use the spelling in Lofft; the State Trials and Lord Campbell have "Somersett" and "Steuart."

ferred the matter to the Full Court of King's Bench; whereupon, on June 22, 1772, judgment was given for the Negro. The basis of the decision, the theme of the argument, was that the only kind of slavery known to English law was villeinage, that the Statute of Tenures (1660) (12 Car. 11, c. 24) expressly abolished villeins regardant to a manor and by implication villeins in gross. The reasons for the decision would hardly stand fire at the present day. The investigation of Paul Vinogradoff and others have conclusively established that there was not a real difference in status between the so-called villein regardant and villein in gross, and that in any case the villein was not properly a slave but rather a serf.⁵ Moreover, the Statute of Tenures deals solely with tenure and not with status.

But what seems to have been taken for granted, namely that slavery, personal slavery, had never existed in England and that the only unfree person was the villein, who, by the way was real property, is certainly not correct. Slaves were known in England as mere personal goods and chattels, bought and sold, at least as late as the middle of the twelfth century.⁶ However weak the reasons given for the decision, its authority has never been questioned and it is good law. But it is good law for England, for even in the Somerset case it was admitted that a concurrence of unhappy circumstances had rendered slavery necessary⁷ in the American colonies: and Parliament had recognized the right of property in slaves there.⁸

⁵ See, e. g., Vinogradoff, *Villeinage in England*, passim; Hallam's *Middle Ages* (ed. 1827), Vol. 3, p. 256; Pollock & Maitland, *History of English Law*, Vol. 1, pp. 395 sqq. Holdsworth's *History of English Law*, Vol. 2, pp. 33, 63, 131; Vol. 3, pp. 167, 377-393.

⁶ See Pollock & Maitland's *History Eng. Law*, Vol. 1, pp. 1-13, 395, 415; Holdsworth's *Hist. Eng. Law*, Vol. 2, pp. 17, 27, 30-33, 131, 160, 216.

⁷ "So spake the fiend and with necessity,

The tyrant's plea, excused his devilish deeds."

Paradise Lost, Bk. 4, ll. 393, 394.

Milton a true lover of freedom well knew the peril of an argument based upon supposed necessity. Necessity is generally but another name for greed or worse.

⁸ E. g., the Statute of (1732) 5 Geo. II, C. 7, enacted, sec. 4, "that from

When Canada was conquered in 1760, slavery existed in that country. There were not only Panis⁹ or Indian Slaves, but also Negro slaves. These were not enfranchised by the conqueror, but retained their servile status. When the united empire loyalists came to this northern land after the

and after the said 29th. September, 1732, the Houses, Lands, Negroes and other Hereditaments and real Estates situate or being within any of the said (British) Plantations (in America) shall be liable" to be sold under execution. Note that the Negroes are "Hereditaments and Real Estate."

⁹ The name *Pani* or *Panis*, Anglicized into *Pawnee*, was used generally in Canada as synonymous with "Indian Slave" because these slaves were usually taken from the Pawnee tribe. Those who would further pursue this matter will find material in the *Wisconsin Historical Collections*, Vol. XVIII, p. 103 (note); Lafontaine, *L'Esclavage in Canada* cited in the above; *Michigan Pioneer and Historical Collections*, Vol. XXVII, p. 613 (n); Vol. XXX, pp. 402, 596. Vol. XXXV, p. 548; Vol. XXXVII, p. 541. From Vol. XXX, p. 546, we learn that Dr. Anthon, father of Prof. Anthon of Classical Text-book fame, had a "Panie Wench" who when the family had the smallpox "had them very severe" along with Dr. Anthon's little girl and his "aeltest boy" "whoever they got all safe over it and are not disfigured."

Dr. Kingsford in his *History of Canada*, Vol. V, p. 30 (n), cites from the *Documents of the Montreal Historical Society*, Vol. I, p. 5, an "ordonnance au sujet des Nègres et des sauvages appelés panis, du 15 avril 1709" by "Jacques Raudot, Intendant." "Nous sous le bon plaisir de Sa Majesté ordonnons, que tous les Panis et Nègres qui ont été achetés et qui le seront dans la suite, appartiendront en pleine propriété a ceux qui les ont achetés comme étant leurs esclaves." "We with the consent of His Majesty enact that all the Panis and Negroes who heretofore have been or who hereafter shall be bought shall be the absolute property as their slaves of those who bought them." This ordinance is quoted (*Mich. Hist. Coll.*, XII, p. 511), and its language ascribed to a (non-existent) "wise and humane statute of Upper Canada of May 31, 1798"—a curious mistake, perhaps in copying or printing.

There does not seem to have been any distinction in status or rights or anything but race between the Panis and the other slaves. I do not know of an account of the numbers of slaves in Canada at the time; in Detroit, March 31, 1779, there were 60 male and 78 female slaves in a population of about 2,550 (*Mich. Hist. Coll.*, X, p. 326); Nov. 1, 1780, 79 male and 96 female slaves in a somewhat smaller population (*Mich. Hist. Coll.*, XIII, p. 53); in 1778, 127 in a population of 2,144 (*Mich. Hist. Coll.*, IX, p. 469); 85 in 1773, 179 in 1782 (*Mich. Hist. Coll.*, VII, p. 524); 78 male and 101 female (*Mich. Hist. Coll.*, XIII, p. 54). The Ordinance of Congress July 13, 1787, forbidding slavery "northwest of the Ohio River" (passed with but one dissenting voice, that of a Delegate from New York) was quite disregarded in Detroit (*Mich. Hist. Coll.*, I, 415); and indeed Detroit and the neighboring country remained British (de facto) until August, 1796, and part of Upper Canada from 1791 till that date.

acknowledgment by Britain of the independence of the revolted colonies, some of them brought their slaves with them: and the Parliament of Great Britain in 1790 passed an Act authorizing any "subject of . . . the United States of America" to bring into Canada "any negroes" free of duty having first obtained a license from the Lieutenant Governor.¹⁰

An immense territory formerly Canada was erected into a Government or Province of Quebec by Royal Proclamation in 1763 and the limits of the province were extended by the Quebec Act in 1774.¹¹ This province was divided into two provinces, Upper Canada and Lower Canada in 1791.¹² At this time the whole country was under

¹⁰ This Act (1790) 30 Geo. III, c. 27, was intended to encourage "new settlers in His Majesty's Colonies and Plantations in America" and applied to all "subjects of the United States." It allowed an importation into any of the Bahama, Bermuda or Somers Islands, the Province of Quebec (then including all Canada), Nova Scotia and every other British territory in North America. It allowed the importation by such American subjects of "negros, household furniture, utensils of husbandry or cloathing free of duty," the "household furniture, utensils of husbandry and cloathing" not to exceed in value £50 for every white person in the family and £2 for each negro, any sale of negro or goods within a year of the importation to be void.

¹¹ The Royal Proclamation is dated 7th October, 1763; it will be found in Shortt & Doughty, *Documents relating to the Constitutional History of Canada* published by the *Archives of Canada*, Ottawa, 1907, pp. 119 sqq. The Proclamation fixes the western boundary of the (Province or) Government at a line drawn from the south end of Lake Nipissing to where the present international boundary crosses the River St. Lawrence.

The Quebec Act is (1774) 14 Geo. III, C. 83. It extends Quebec south to the Ohio and west to the Mississippi; Shortt & Doughty, pp. 401 sqq.

¹² The division of the Province of Quebec into two provinces, *i. e.*, Upper Canada and Lower Canada, was effected by the Royal Prerogative, Sec. 31 George III, c. 31, the celebrated Canada of Constitutional Act. The Message sent to Parliament expressing the Royal intention is to be found copied in the Ont. Arch. Reports for 1906, p. 158. After the passing of the Canada Act, an Order in Council was passed August 24, 1791 (Ont. Arch. Rep., 1906, pp. 158 et seq.), dividing the Province of Quebec into two provinces and under the provisions of sec. 48 of the act directing a royal warrant to authorize the Governor or Lieutenant-Governor of the Province of Quebec or the person administering the government there, to fix and declare such day as he shall judge most advisable for the commencement of the effect of the legislation in the new provinces not later than December 31, 1791. Lord Dorchester (Sir Guy Carleton) was appointed, September 12, 1791, Captain General and Governor-in-Chief of

the French Canadian law in civil matters. The law of England had been introduced into the old Government of the Province of Quebec by the Royal Proclamation of 1763; but the former French Canadian law had been reintroduced in 1774 by the Quebec Act in matters of property and civil rights, leaving the English criminal law in full force. The law, civil and criminal, had been modified in certain details (not of importance here) by Ordinances of the Governor and Council of Quebec.

The very first act of the first Parliament of Upper Canada reintroduced the English civil law.¹³ This did not destroy slavery, nor did it ameliorate the condition of the slave. Rather the reverse, for as the English law did not, like the civil law of Rome and the systems founded on it, recognize the status of the slave at all, when it was forced by grim fact to acknowledge slavery it had no room for the slave except as a mere piece of property. Instead of giving him rights like those of the "servus," he was deprived of all rights, marital, parental, proprietary, even the right to live. In the English law and systems founded on it, the slave had no rights which the master was bound to respect.¹⁴

both provinces and he received a Royal warrant empowering him to fix a day for the legislation becoming effective in the new provinces (Ont. Arch. Rep., 1906, p. 168). In the absence of Dorchester, General Alured Clarke, Lieutenant Governor of the Province of Quebec, issued November 18, 1791, a proclamation fixing Monday, December 26, 1791, as the day for the commencement of the said legislation (Ont. Arch. Rep., 1906, pp. 169-171). Accordingly technically and in law, the new province was formed by Order in Council, August 24, 1791, but there was no change in administration until December 26, 1791.

¹³ The first session of the First Parliament of Upper Canada was held at Newark (now Niagara-on-the-Lake) September 17 to October 15, 1792; the statute referred to is (1792) 32 Geo. III, c. 1 (U. C.).

¹⁴ Everyone will remember the words of the Chief Justice of the Supreme Court of the United States in the celebrated Dred Scott case. In *Dred Scott v. Sandford*, 1856 (19 How. 354, pp. 404, 405), Chief Justice Roger B. Taney, speaking of the view taken of the Negro when the Constitution was framed, says: "They were at that time considered as a subordinate and inferior class of beings who had been subjugated by the dominant race and whether emancipated or not, yet remained subject to their authority and had no rights or privileges but such as those who held the power and the Government might choose to grant them" (p. 407). "They had no more than a century before been regarded as beings of an inferior order . . . and so far inferior that they had no rights

The first Lieutenant-Governor of Upper Canada was Col. John Graves Simcoe. He hated slavery and had spoken against it in the House of Commons in England. Arriving in Upper Canada in the summer of 1792, he was soon made fully aware that the horrors of slavery were not unknown in his new Province. The following is a report of a meeting of his Executive Council:

"At the Council Chamber, Navy Hall, in the County of Lincoln, Wednesday, March 21st, 1793.

"PRESENT

"His Excellency, J. G. Simcoe, Esq., Lieut.-Governor, &c., &c.,
The Hon^{ble} Wm. Osgoode, Chief Justice
The Hon^{ble} Peter Russell.

"Peter Martin (a negro in the service of Col. Butler) attended the Board for the purpose of informing them of a violent outrage committed by one Fromand, an Inhabitant of this Province, residing near Queens Town, or the West Landing, on the person of Chloe Cooley a Negro girl in his service, by binding her, and violently and forcibly transporting her across the River, and delivering her against her will to certain persons unknown; to prove the truth of his Allegation he produced Wm. Grisley (or Crisley).

"William Grisley an Inhabitant near Mississague Point in this Province says: that on Wednesday evening last he was at work at Mr. Froomans near Queens Town, who in conversation told him, he was going to sell his Negro Wench to some persons in the States, that in the Evening he saw the said Negro girl, tied with a rope, that afterwards a Boat was brought, and the said Frooman with his Brother and one *Vanevery*, forced the said Negro Girl into it. that he was desired to come into the boat, which he did, but did not assist or was otherwise concerned in carrying off the said Negro which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold and treated as an ordinary article of merchandise and traffic" (p. 411). "All of them had been brought here as articles of merchandise."

This repulsive subject now chiefly of historical interest is treated at large in such works as Cobb's *Law of Slavery*, Philadelphia, 1858; Hurd's *Law of Freedom and Bondage*, Boston, 1858; Von Holst's *Const. Hist. U. S.* (1750-1833), Chicago, 1877; the judgments of all the Judges in the Dred Scott case are well worth reading, especially that of Mr. Justice Curtis.

Girl, but that all the others were, and carried the Boat across the River; that the said Negro Girl was then taken and delivered to a man upon the Bank of the River by Fromand, that she screamed violently and made resistance, but was tied in the same manner as when the said William Grisley first saw her, and in that situation delivered to the man. . . . Wm. Grisley farther says that he saw a negro at a distance, he believes to be tied in the same manner, and has heard that many other People mean to do the same by their Negroes

"*Resolved.*—That it is necessary to take immediate steps to prevent the continuance of such violent breaches of the Public Peace, and for that purpose, that His Majesty's Attorney-General, be forthwith directed to prosecute the said Fromond.

"Adjourned."¹⁵

¹⁵ This is copied from the *Canadian Archives Collection*, Q. 282, pt. 1, pp. 212 sqq.; taken from the official report sent to Westminster by Simcoe. There is the usual amount of uncertainty in spelling names Grisley or Crisly, Fromand, Froman, Fromond or Fromond (in reality Vrooman).

Osgoode was an Englishman, the first Chief Justice of Upper Canada. Arriving in this Province in the summer of 1792, he left to become Chief Justice of Lower Canada in the summer of 1794. Resigning in 1801, he returned to England on a pension which he enjoyed until his death in 1824. He left no mark on our jurisprudence and never sat in any but trial courts of criminal jurisdiction. Osgoode Hall, our Ontario Palais de Justice, is called after him.

Russell came to Upper Canada also in 1792 as Receiver-General and Legislative Councillor; he was an Executive Councillor and when Simcoe left Canada in 1796, he acted as Administrator until the coming of the new Lieutenant Governor Peter Hunter in 1799. Russell was not noted for anything but his acquisitiveness but he was a faithful servant of the Crown in his own way.

Col. John Butler, born in Connecticut in 1728, became a noted leader of Indians. He took the Loyalist side, raising the celebrated Butler's Rangers; he settled at Niagara after the Revolutionary war and proved himself a useful citizen; he died in 1796. See Cruikshanks' *Butler's Rangers*, Lundy's Lane Historical Society's publication; Robertson's *Free Masonry in Canada*, Vol. 1, p. 470; Riddell's edition of *La Rochefoucauld's Travels in Canada*, 1795, published by the Ontario Archives, 1917, p. 177.

Navy Hall was in the little town which Simcoe named "Newark," which before this had been called Niagara, West Niagara, Nassau, Lenox and Butlersburg, now called Niagara or Niagara-on-the-lake. Navy Hall was the seat of government from 1792 to 1797. Queens Town is the present Queenston; Mississagua Point is at the embouchure of the Niagara River; it is still known by the same name, spelled generally however with a final "a." Nothing seems to be known of the subsequent fate of Chloe Cooley.

The Vroomans and Cryslers (or Chrystlers or Chrysler) the same family as Chrystler of Chrystler's Farm, the scene of an American defeat, November

The Attorney-General was John White¹⁶ an accomplished English lawyer. He knew that the brutal master was well within his rights in acting as he did. He had the 11, 1813, were well-known residents. I am indebted to General E. A. Cruikshank for the following note:

"The Vrooman Farm is situated on the west bank of the Niagara, in the township of Niagara, about a mile below the village of Queenston, and includes that feature of the river bank generally known as Vrooman's Point; it was still in the possession of the Vrooman family when I last visited the place about twelve years ago. The remains of a small half-moon or redan battery on the point which had been constructed in the War of 1812, and played a considerable part in the battle of Queenston were then quite well marked. One of the Vroomans of that time was in the militia artillery, and assisted to serve the gun mounted on the battery. The possessor of the farm was then, I think, more than eighty years of age, but he was active and in possession of his memory and other faculties. He stated to me the exact number of shots which he had been informed by his father, or the Vrooman engaged in the action, had been fired from this gun, which of course, may or may not be correct. An Adam Chrysler, who was a lieutenant in the Indian Department in the Revolutionary War, and before that, a resident in the Schoharie district, of the Mohawk country, received lands either in the township of Niagara or the township of Stamford, near the village of Queenston. His grandson, John Chrysler, some twenty years ago, then being quite an old man, who is now dead, loaned me some very interesting documents which had been preserved in the family, and belonged to this Adam Chrysler. One of them, I remember, was the original instructions issued to him, and signed by Lieut.-Colonel John Butler, the deputy superintendent general, strictly enjoining him to restrain the Indians, with whom he was acting, from all acts of cruelty upon prisoners and non-combatants. Some members of his family, ladies, were residing at Niagara Falls, Ontario, ten years ago, and I presume still are there. I have no doubt that it was some member of Adam Chrysler's family who took part in the abduction of the Cooley girl. The original spelling of this name was Kreisler, which is a fairly common German name in the Rhine Palatinate, from which this family came."

In the report by Col. John Butler of the Survey of the Settlement at Niagara, August 25, 1782 (*Can. Arch.*, Series B, 169, p. 1), McGregor Van-Every is named as the head of a family. He was married, without children, hired men or slaves, had 3 horses, no cows, sheep or hogs, 8 acres of "clear land" and raised 4 bushels of Indian corn and 40 of potatoes but no wheat or oats. His neighbor, Thomas McMicken, was married, had two young sons, one hired man and one male slave. He had two horses, 1 cow and 20 hogs, and raised ten bushels of Indian corn, 10 of oats and 10 of potatoes (no wheat) on his 8 acres of "clear land."

¹⁶ John White called to the Bar in 1785 at the Inner Temple (probably); he practised for a time but unsuccessfully in Jamaica and through the influence of his brother-in-law, Samuel Shepherd and of Chief Justice Osgoode was appointed the first Attorney General of Upper Canada. He arrived in the

same right to bind, export, and sell his slave as to bind, export, and sell his cow. Chloe Cooley had no rights which Vrooman was bound to respect: and it was no more a breach of the peace than if he had been dealing with his heifer. Nothing came of the direction to prosecute and nothing could be done.

It is probable that it was this circumstance which brought about legislation. At the Second Session of the First Parliament which met at Newark, May 31, 1793, a bill was introduced and unanimously passed the House of Assembly. The trifling amendments introduced by the Legislative Council were speedily concurred in, the royal assent was given July 9, 1793, and the bill became law.¹⁷

Province in the summer of 1792 and was elected a member of the first House of Assembly for Leeds and Frontenac. He was an active and useful member. It is probable, but the existing records do not make it certain, that it was he who introduced and had charge in the House of Assembly of the Bill for the abolition of salvery passed in 1793, shortly to be mentioned. In January, 1800, he was killed in a duel at York, later Toronto, by Major John Small, Clerk of the Executive Council. His will, drawn by himself after his fatal wound, is still extant in the Court of Probate records at Toronto. One clause reads: "I desire to be rolled up in a sheet and not buried fantastically, and that I may be buried at the back of my own house." Buried in his garden at his direction, his bones were accidentally uncovered in 1871 and reverently buried in Toronto. His manuscript diary is still extant, a copy being in the possession of the writer.

¹⁷ The statute is (1793) 33 Geo. III, c. 7, (U. C.). The Parliament of Upper Canada had two Houses, the Legislative Council, an Upper House, appointed by the Crown and the Legislative Assembly, a Lower House or House of Commons, as it was sometimes called, elected by the people. The Lieutenant Governor gave the royal assent. The bill was introduced in the Lower House, probably by Attorney General White, as stated in last note, and read the first time, June 19. It went to the committee of the whole June 25, and was the same day reported out. On June 26 it was read the third time, passed and sent up for concurrence. The Legislative Council read it the same day for the first time, went into Committee over it the next day, June 28, and July 1, when it was reported out with amendments, passed and sent down to the Commons July 2. That House promptly concurred and sent the bill back the same day. See the official reports; *Ont. Arch. Reports* for 1910 (Toronto, 1911), pp. 25, 26, 27, 28, 32, 33, *Ont. Arch. Rep.* for 1909 (Toronto, 1911), pp. 33, 35, 36, 38, 41, 42.

The first Fugitive Slave Law was passed by the United States in 1793. Three years afterwards occurred an episode, little known and less commented upon, showing very clearly the views of George Washington on the subject of fugitive slaves, at least, of those slaves who were his own.

It recited that it was unjust that a people who enjoy freedom by law should encourage the introduction of slaves, and that it was highly expedient to abolish slavery in the

A slave girl of his escaped and made her way to Portsmouth, N. H. Washington, on discovering her place of refuge, wrote concerning her to Joseph Whipple, the Collector at Portsmouth, November 28, 1796. The letter is still extant. It is of three full pages and was sold in London in 1877 for ten guineas (*Magazine of American History*, Vol. 1, December, 1877, p. 759). Charles Sumner had it in his hands when he made the speech reported in Charles Sumner's *Works*, Vol. III, p. 177. Washington in the letter described the fugitive and particularly expressed the desire of "her mistress," Mrs. Washington, for her return to Alexandria. He feared public opinion in New Hampshire, for he added

"I do not mean however, by this request that such violent measures should be used as would excite a mob or riot which might be the case if she has adherents; or even uneasy sensations in the minds of well-disposed citizens. Rather than either of these should happen, I would forgo her services altogether and the example also which is of infinite more importance."

In other words, "if the slave girl has no friends or 'adherents' " send her back to slavery—if she has and they would actively oppose her return, let her go—and even if it only be that "well-disposed citizens" disapprove of her capture and return, let her remain free.

There may be some difficulty in justifying Washington's course by the opinion of Thomas Aquinas (*Summa Theologies*, 1^a ma., 2^a dae., Quaest. XCVI, Art. 4), who says that an unjust law is not binding in conscience "*nisi forte propter vitandum scandalum vel turbationem.*" Aquinas is speaking of an unjust law which may be resisted unless scandal or tumult would result from resistance. Washington is speaking of a law which he considers right, but which he would not enforce if it should occasion such evils. The analogy does not hold as the editor of Charles Sumner's *Works* seems to think (Vol. III, p. 178, note).

Whipple answered from Portsmouth, December 22, 1796:

"I will now, Sir, agreeably to your desire, send her to Alexandria if it be practicable without the consequences which you except—that of exciting a riot or a mob or creating uneasy sensations in the minds of well disposed persons. The first cannot be calculated beforehand; it will be governed by the popular opinion of the moment or the circumstances that may arise in the transaction. The latter may be sought into and judged of by conversing with such persons without discovering the occasion. So far as I have had opportunity, I perceive that different sentiments are entertained on the subject."

Whipple made enquiry. Public opinion in Portsmouth was adverse to the return of the fugitive. She was unmolested and lived out a long life in Portsmouth and Kittery.

Nothing more clearly and impressively shows the veneration felt by his countrymen for George Washington than the praise the fearless, outspoken, uncompromising hater of slavery, Charles Sumner, of the conduct of the President in this transaction. Sumner considered the poor slave girl "a monument

Province so far as it could be done gradually without violating private property; and proceeded to repeal the Imperial Statute of 1790 so far as it related to Upper Canada, and to enact that from and after the passing of the Act, "No Negro or other person who shall come or be brought into this Province . . . shall be subject to the condition of a slave or to" bounden involuntary service for life. With that regard for property characteristic of the English-speaking peoples, the act contained an important proviso which continued the slavery of every "negroe or other person subjected to such service" who has been lawfully brought into the Province. It then enacted that every child born after the passing of the act, of a Negro mother or other woman subjected to such service should become absolutely free on attaining the age of twenty-five, the master in the meantime to provide "proper nourishment and

of the just forbearance of him whom we aptly call Father of his Country. . . . While a slaveholder and seeking the return of a fugitive, he has left in permanent record a rule of conduct which if adopted by his country will make slave hunting impossible." With almost any other man, Sumner would have no praise or reverence for a desire to force a fugitive back into slavery unless prevented by fear of mob or riot or adverse public opinion.

In the same letter Washington gives what may be considered a reason or excuse for his demand. "However well disposed I might be to a gradual abolition, or even to an entire emancipation of that description of people, if the latter was itself practicable at this moment, it would neither be expedient nor just to reward unfaithfulness with a premature preference and thereby discontent beforehand the minds of all her fellow servants who by their steady attachment are far more deserving than herself of favour."

This is the familiar pretext of the master, private or state. Those who rebel against oppression and wrong are not to be given any relief—that would be unjust to those who tamely submit. That very argument was advanced by the ruler across the sea against the proposition to come to terms with Washington and his party who had ventured to oppose the would-be master.

And it is to be noted that Washington did not free those "who by their steady attachment are far more deserving . . . of favour" till he had had all the advantage he could from their services—he did indeed free them by his will, but only after the death of his wife.

Sumner cannot be said to minimize his merits when he says "He was at the time a slaveholder—often expressing himself with various degrees of force against slavery, and promising his suffrage for its abolition, he did not see this wrong as he saw it at the close of life." (*Sumner's Works*, Vol. III, pp. 759 sq.)

cloathing" for the child, but to be entitled to put him to work, all issue of such children to be free whenever born. It further declared any voluntary contract of service or indenture should not be binding longer than nine years. Upper Canada was the first British possession to provide for the abolition of slavery.¹⁸

It will be seen that the Statute did not put an end to slavery at once. Those who were lawfully slaves remained slaves for life unless manumitted and the statute rather discouraged manumission, as it provided that the master on liberating a slave must give good and sufficient security that the freed man would not become a public charge. But, defective as it was, it was not long without attack. In 1798, Simcoe had left the province never to return,¹⁹ and while

¹⁸ Vermont excluded slavery by her Bill of Rights (1777), Pennsylvania and Massachusetts passed legislation somewhat similar to that of Upper Canada in 1780; Connecticut and Rhode Island in 1784, New Hampshire by her Constitution in 1792, Vermont in the same way in 1793; New York began in 1799 and completed the work in 1827, New Jersey 1829; Indiana, Illinois, Michigan, Wisconsin and Iowa were organized as a Territory in 1787 and slavery forbidden by the Ordinance, July 13, 1787, but it was in fact known in part of the Territory for a score of years. A few slaves were held in Michigan by tolerance until far into the nineteenth century notwithstanding the prohibition of the fundamental law (*Mich. Hist. Coll.*, VII, p. 524). Maine as such never had slavery having separated from Massachusetts in 1820 after the Act of 1780, although it would seem that as late as 1833 the Supreme Court of Massachusetts left it open when slavery was abolished in that State (*Commonwealth v. Aves*, 18 Pick. 193, 209). (See Cobb's *Slavery*, pp. clxxi, clxxii, 209; Sir Harry H. Johnston's *The Negro in the New World*, an exceedingly valuable and interesting work but not wholly reliable in minutiae, pp. 355 et seq.)

¹⁹ Simcoe was almost certainly the prime mover in the legislation of 1793. When giving the royal assent to the bill he said: "The Act for the gradual abolition of Slavery in this Colony, which it has been thought expedient to frame, in no respect meets from me a more cheerful concurrence than in that provision which repeals the power heretofore held by the Executive Branch of the Constitution and precludes it from giving sanction to the importation of slaves, and I cannot but anticipate with singular pleasure that such persons as may be in that unhappy condition which sound policy and humanity unite to condemn, added to their own protection from all undue severity by the law of the land may henceforth look forward with certainty to the emancipation of their offspring." (See *Ont. Arch. Rep.* for 1909, pp. 42-43.) I do not understand the allusion to "protection from undue severity by the Law of the land." There had been no change in the law, and undue severity to slaves was prevented only by public opinion. It is practically certain that no such bill as

the government was being administered by the time-serving Peter Russell, a bill was introduced into the Lower House to enable persons "migrating into the province to bring their negro slaves with them." The bill was contested at every stage but finally passed on a vote of eight to four. In the Legislative Council it received the three months' hoist and was never heard of again.²⁰ The argument in favor of

that of 1798 would have been promoted with Simcoe at the head of the government as his sentiments were too well known.

²⁰ *Ont. Arch. Rep.* for 1909, pp. 64, 69, 70, 71, 74; *ibid.* for 1910, pp. 67, 68, 69, 70.

The bill was introduced in the Lower House by Christopher Robinson, member for Addington and Ontario, Ontario being then comprised of the St. Lawrence and Lake Ontario Islands, and having nothing in common with the present County of Ontario. He was a Virginian loyalist, who in 1784 emigrated to New Brunswick, and in 1788 to that part of Canada later Lower Canada and in 1792 to Upper Canada. He lived in Kingston till 1798 and then came to York, later Toronto, but died three weeks afterwards. He was one of the lawyers who took part in the inauguration of the Law Society of Upper Canada at Wilson's Tavern, Newark, in July, 1797, and was an active and successful practitioner. His ability was great, but his fame is swallowed up by that of his more famous son, Sir John Beverley Robinson, the first Canadian Chief Justice of Upper Canada, and of his grandson, the much loved and much admired Christopher Robinson, Q.C., of our own time. Accustomed from infancy to slavery, he saw no great harm in it—no doubt he saw it in its best form.

The chief opponent of the bill was Robert Isaac Dey Gray, the young solicitor general. John White was not in this the second house. The son of Major James Gray, a half-pay British Officer, he studied law in Canada. He was elected member of the House of Assembly for Stormont in the election of 1796 and again in 1804. He was appointed the first Solicitor General in 1797 and was drowned in 1804 in the *Speedy* disaster. An Indian, Ogetonicut, accused of a murder in the Newcastle District, was captured on the York Peninsula, now Toronto or Hiawatha Island, in the Home District, and had to be sent to Newcastle, now Presqu' Isle Point near Brighton, in the Newcastle District, for trial. The Government Schooner *Speedy* sailed for Newcastle with the Assize Judge Gray; Macdonell, who was to defend the Indian; the Indian prisoner, Indian interpreters, witnesses, the High Constable of York and certain inhabitants of York. It was lost, captain, crew and passengers—*spurious versenkt*.

The motion for the three months' hoist in the Upper House was made by the Honorable Richard Cartwright seconded by the Honorable Robert Hamilton. These men, who had been partners, generally agreed on public measures and both incurred the enmity of Simcoe. He called Hamilton a Republican, then a term of reproach distinctly worse than Pro-German would be now, and

the bill was based on the scarcity of labor which all contemporary writers speak of, the inducement to intending settlers to come to Upper Canada where they would have the same privileges in respect of slavery as in New York and elsewhere; in other words the inevitable appeals to greed.

After this bill became law, slavery gradually disappeared. Public opinion favored manumission and while there were not many manumissions *inter vivos*,²¹ in some measure owing to the provisions of the act requiring security to be given in such case against the freed man becoming a public charge, there were not a few liberations by will.²²

Cartwright was, if anything, worse. But both were men of considerable public spirit and personal integrity. For Cartwright see *The Life and Letters of Hon. Richard Cartwright*, Toronto, 1876. For Hamilton see Riddell's edition of La Rochefoucault's *Travels in Canada in 1795*, Toronto, 1817, in *Ont. Arch. Rep.* for 1916; Miss Carnochan's *Queentown in Early Years, Niagara Hist. Soc. Pub.*, No. 25; *Buffalo Hist. Soc. Pub.*, Vol. 6, pp. 73-95.

There was apparently no division in the Upper House although there were five other Councillors in addition to Cartwright and Hamilton in attendance that session viz.: McGill, Shaw, Duncan, Baby and Grant; and the bill passed committee of the whole.

²¹ Slaves were valuable even in those days. A sale is recorded in Detroit of a "certain Negro man Pompey by name" for £45 New York Currency (\$112.50) in October, 1794; and the purchaser sold him again January, 1795, for £50 New York Currency (\$125.00). (*Mich. Hist. Coll.*, XIV, p. 417.) But it would seem that from 1770 to 1780 the price ranged to \$300 for a man and \$250 for a woman (*Mich. Hist. Coll.*, XIV, p. 659). The number of slaves in Detroit is said to have been 85 in 1773 and 179 in 1782 (*Mich. Hist. Coll.*, VII, p. 524).

The best people in the province continued to hold slaves. On February 19, 1806, the Honourable Peter Russell, who had been administrator of the government, and therefore head of the State for three years, advertised for sale at York "A Black woman named Peggy, aged 40 years, and a Black Boy, her son, named Jupiter, aged about 15 years," both "his property," "each being servants for life"—the woman for \$150 and the boy for \$200, 25 per cent off for cash. William Jarvis, the secretary, two years later, March 1, 1811, had two of his slaves brought into court for stealing gold and silver out of his desk. The boy "Henry commonly called prince" was committed for trial and the girl ordered back to her master. Other instances will be found in Dr. Scadding's very interesting work, *Toronto of Old*, Toronto, 1873, at pp. 292 sqq.

²² A number of interesting wills are in the Court of Probate files at Osgoode Hall, Toronto. One of them only I shall mention, viz.: that of Robert I. D. Gray, the first solicitor general of the province, whose tragic death is

The number of slaves in Upper Canada was also diminished by what seems at first sight paradoxical, that is, their flight across the Detroit River into American territory. So long as Detroit and its vicinity were British in fact and even for some years later, Section 6 of the Ordinance of 1787 "that there shall be neither slavery nor involuntary servitude in the said territory otherwise than as the punishment of crime" was in great measure a dead letter: but when Michigan was incorporated as a territory in 1805, the ordinance became effective. Many slaves made their way from Canada to Detroit, a real land of the free; so many, indeed, that we find that a company of Negro militia was formed in Detroit in 1806 to assist in the general defence of the territory, composed entirely of escaped slaves from Canada.²³

Almost from the passing of the Canada Act, however, runaway Negroes began to come to Upper Canada, fleeing from slavery; this influx increased and never ceased until the American Civil War gave its death blow to slavery in the United States. Hundreds of blacks thus obtained their freedom, some having been brought by their masters near to the international boundary and then clandestinely or by force effecting a passage; some coming from far to the South, guided by the North Star; many assisted by friends

related above. In this will, dated August 27, 1803, a little more than a year before his death, he releases and manumits "Dorinda my black woman servant . . . and all her children from the State of Slavery," in consequence of her long and faithful services to his family. He directs a fund to be formed of £1,200 or \$4,800 the interest to be paid to "the said Dorinda her heirs and Assigns for ever." To John Davis, Dorinda's son, he gave 200 acres of land, Lot 17 in the Second Concession of the Township of Whitby and also £50 or \$200. John, after the death of his master whose body servant and valet he was, entered the employ of Mr., afterwards Chief, Justice Powell; but he had the evil habit of drinking too much and when he was drunk he would enlist in the Army. Powell got tired of begging him off and after a final warning left him with the regiment in which he had once more enlisted. Davis is said to have been in the battle of Waterloo. He certainly crossed the ocean and returned later on to Canada. He survived till 1871, living at Cornwall, Ontario, a well-known character. With him died the last of all those who had been slaves in the old Province of Quebec or the Province of Upper Canada.

²³ *Mich. Hist. Coll.*, XIV, p. 659.

more or less secretly. The Underground Railroad was kept constantly running.²⁴ These refugees joined settlements with other people of color freeborn or freed in the western part of the Peninsula, in the counties of Essex and Kent and elsewhere.²⁵ Some of them settled in other parts of the province, either together or more usually sporadically.

At the time of the outbreak of the Civil War there were many thousands of black refugees in the province.²⁶ More than half of these were manumitted slaves who in consequence of unjust laws had been forced to leave their State. While some of such freedmen went to the Northern States, most came to Canada, some returning to the Northern States. The Negro refugees were superior to most of their race, for none but those with more than ordinary qualities could reach Canada.²⁷

The masters of runaway slaves did not always remain quiet when their slave reached this province. Sometimes they followed him in an attempt to take him back. There are said to have been a few instances of actual kidnapping,

²⁴ A fairly good account of the Underground Railroad will be found in William Still's *Underground Railroad*, Philadelphia, 1872, in W. M. Mitchell's *Underground Railway*, London, 1860; in W. H. Siebert's *Underground Railway*, New York, 1899; and in a number of other works on Slavery. Considerable space is given the subject in most works on slavery.

One branch of it ran from a point on the Ohio River, through Ohio and Michigan to Detroit; but there were many divagations, many termini, many stations: Oberlin was one of these. See Dr. A. M. Ross' *Memoirs of a Reformer*, Toronto, 1893, and *Mich. Hist. Coll.*, XVII, p. 248.

²⁵ The Buxton Mission in the County of Kent is well known. The Wilberforce Colony in the County of Middlesex was founded by free Negroes; but they had in mind to furnish homes for future refugees. See Mr. Fred Landon's account of this settlement in the recent (1918) *Transactions of the London and Middlesex Hist. Soc.*, pp. 30-44. For an earlier account see A. Steward's *Twenty Years a Slave*, Rochester, N. Y., 1857.

²⁶ Ross in his *Memoirs* gives, on page 111, 40,000, but he may be speaking for all Canada. The number is rather high for Upper Canada alone.

²⁷ "The Kingdom of heaven suffereth violence and the violent take it by force." There can be no doubt that the Southern Negro looked upon Canada as a paradise. I have heard a colored clergyman of high standing say that of his own personal knowledge, dying slaves in the South not infrequently expressed a hope to meet their friends in Canada.

a few of attempted kidnapping.²⁸ There have been cases in which criminal charges have been laid against escaped slaves, and their extradition sought, ostensibly to answer the criminal charges. It has always been the theory in this province that the governor has the power independently of statute or treaty to deliver up alien refugees charged with crime.²⁹ To make it clear, the Parliament of Upper Canada in 1833 passed an Act for the apprehension of fugitive offenders from foreign countries, and delivering them up to justice.³⁰ This provides that on the requisition of the executive of any foreign country the governor of the province on the advice of his executive council may deliver up any person in the province charged with "Murder, Forgery, Larceny or other crime which if committed within the Province would have been punishable with death, cor-

²⁸ These being merely traditional and not supported by contemporary documents are more or less mythical and I do not attempt to collect the various and varying stories.

There are several stories more or less well authenticated of masters bringing slaves into Canada with the intention of taking them back again as Charles Stewart intended with his slave James Somerset and the slaves successfully asserting their freedom, resisting removal with the assistance of Canadians. Of one of the most shocking cases of wrong, if not quite kidnapping, a citizen of Toronto was the subject. John Mink, a respectable man with some Negro blood, had a livery stable on King Street, Toronto. He was also the proprietor of stage-coach lines and a man of considerable wealth. He had an only daughter of great personal beauty, and showing little trace of Negro origin. It was understood that she would marry no one but a white man, and that the father was willing to give her a handsome dowry on such a marriage. A person of pure Caucasian stock from the Southern States came to Toronto, wooed and won her. They were married and the husband took his bride to his home in the South. Not long afterwards the father was horrified to learn that the plausible scoundrel had sold his wife as a slave. He at once went South and after great exertion and much expense, he succeeded in bringing back to his house the unhappy woman, the victim of brutal treachery.

There have been told other stories of the same kind, equally harrowing, and unfortunately not ending so well, but I have not been able to verify them. The one mentioned here I owe to the late Sir Charles Moss, Chief Justice of Ontario.

²⁹ The same rule obtained in Lower Canada; (1827) re Joseph Fisher, 1 Stuart's L. C. Rep. 245.

³⁰ This is the Act (1833), 3 Will IV, c. 7 (U. C.). This came forward as cap. 96 in the Consolidated Statutes of Upper Canada 1859, but was repealed by an Act of (United) Canada (1860), 23 Vic., c. 91 (Can.).

poral punishment, the Pillory, whipping or confinement at hard labour." The person charged might be arrested and detained for inquiry. The Act was permissive only and the delivery up was at the discretion of the governor.

When this act was in force Solomon Mosely or Moseby, a Negro slave, came to the Province across the Niagara River from Buffalo which he had reached after many days' travel from Louisville, Kentucky. His master followed him and charged him with the larceny of a horse which the slave took to assist him in his flight. That he had taken the horse there was no doubt, and as little that after days of hard riding he had sold it. The Negro was arrested and placed in Niagara jail; a *prima facie* case was made out and an order sent for his extradition.

The people of color of the Niagara region made Mosely's case their own and determined to prevent his delivery up to the American authorities to be taken to the land of the free and the home of the brave, knowing that there for him to be brave meant torture and death, and that death alone could set him free. Under the leadership of Herbert Holmes, a yellow man,³¹ a teacher and preacher, they lay around the jail night and day to the number of from two to four hundred to prevent the prisoner's delivery up. At length the deputy sheriff with a military guard brought out the unfortunate man shackled in a wagon from the jail yard, to go to the ferry across the Niagara River. Holmes and a man of color named Green grabbed the lines. Deputy Sheriff McLeod from his horse gave the order to fire and charge. One soldier shot Holmes dead and another bayoneted Green, so that he died almost at once. Mosely, who was very athletic, leaped from the wagon and made his escape. He went to Montreal and afterwards to England, finally returning to Niagara, where he was joined by his wife, who also escaped from slavery.

An inquest was held on the bodies of Holmes and Green.

³¹ To his people he seems to have been known as Hubbard Holmes; he is always called a yellow man, whether mulatto, quadroon, octoroon or other does not appear.

The jury found "justifiable homicide" in the case of Holmes; "whether justifiable or unjustifiable there was not sufficient evidence before the jury to decide" in the case of Green. The verdict in the case of Holmes was the only possible verdict on the admitted facts. Holmes was forcibly resisting an officer of the law in executing a legal order of the proper authority. In the case of Green the doubt arose from the uncertainty whether he was bayoneted while resisting the officers or after Mosely had made his escape. The evidence was conflicting and the fact has never been made quite clear. No proceedings were taken against the deputy sheriff; but a score or more of the people of color were arrested and placed in prison for a time. The troublous times of the Mackenzie Rebellion came on, the men of color were released, many of them joining a Negro militia company which took part in protecting the border.

The affair attracted much attention in the province and opinions differed. While there were exceptions on both sides, it may fairly be said that the conservative and government element reprobated the conduct of the blacks in the strongest terms, being as little fond of mob law as of slavery, and that the radicals, including the followers of Mackenzie, looked upon Holmes and Green as martyrs in the cause of liberty. That Holmes and Green and their fellows violated the law there is no doubt, but so did Oliver Cromwell, George Washington and John Brown. Every one must decide for himself whether the occasion justified in the courts of Heaven an act which must needs be condemned in the courts of earth.³²

³² The contemporary accounts of this transaction, *e. g.*, in the *Christian Guardian* of Toronto, and the *Niagara Chronicle*, are not wholly consistent. The main facts, however, are clear. Although there was some doubt as to the time, the military guard were ordered to fire. Miss Janet Carnochan has given a good account of this in *Slave Rescue in Niagara, Sixty Years Ago, Niag. Hist. Soc.*, Pub. No. 2. It is said that "the Judge said he must go back," the fact being that the direction was by the executive and not the courts. The *Reminiscences* of Mrs. J. G. Currie, born at Niagara in 1829 and living there at the time of the trouble, are printed in the *Niagara Hist. Soc.*, Pub. No. 20. Mrs. Currie gives a brief account (p. 331) and says that one of the party, one MacIntyre, had a bullet or bayonet wound in his cheek. In Miss Carnochan's

In 1842 the well-known Ashburton Treaty was concluded³³ between Britain and the United States. This by Article X provides that "the United States and Her Britannic Majesty shall, upon mutual requisitions . . . deliver account, her informant, who was the daughter of a slave who had escaped in 1802 and was herself born in Niagara in 1824, says that "the sheriff went up and down slashing with his sword and keeping the people back. Many of our people had sword cuts in their necks. They were armed with all kinds of weapons, pitchforks, flails, sticks, stones. One woman had a large stone in a stocking and many had their aprons full of stones and threw them too." Mrs. Anna Jameson, in her *Sketches in Canada*, ed. of 1852, London, on pp. 55-58, gives another account. She rightly makes the extradition order the governor's act, but errs in saying that "the law was too expressly and distinctly laid down and his duty as Governor was clear and imperative to give up the felon" as "by an international compact between the United States and our province, all felons are mutually surrendered." There was nothing in the common law, or in the statute of 1833 which made it the duty of the governor to order extradition, and there was no binding compact between the United States and Upper Canada such as Mrs. Jameson speaks of. No doubt the reason given by her for the order was that in vogue among the official set with whom she associated, her husband being vice-chancellor and head (treasurer) of the Law Society. The *Christian Guardian*, *Niagara Reporter* and *Niagara Chronicle* and *St. Catharines Journal* of September, October and November, 1837, contain accounts of and comments upon the occurrences, and sometimes attacks upon each other.

Deputy Sheriff Alexander McLeod was a man of some note if not notoriety. During the rebellion of 1837 and 1838 he was in the Militia of Upper Canada. He took a creditable part in the defence of Toronto against the followers of Mackenzie in December, 1837, and was afterwards stationed on the Niagara frontier. There he claimed to have taken part in the cutting out of the Steamer *Caroline* in which exploit a Buffalo citizen, Amos Durfee, was killed. McLeod, visiting Lewiston in New York State, in November, 1840, was arrested on the charge of murder and committed for trial. This arrest was the cause of a great deal of communication and discussion between the governments of the United States and of Great Britain, the latter claiming that what had been done by the Canadian militia was a proper public act and they demanded the surrender of McLeod. This was refused. McLeod was tried for murder at Utica, October, 1841, and acquitted, it being conclusively proved that he was not in the expedition at all.

³³ Concluded at Washington, August 9, 1842, ratification exchanged at London, October 13, 1842, proclaimed November 10, 1842; this treaty put an end to many troublesome questions, amongst them the Maine boundary which it was found impracticable to settle by Joint Commissions or by reference to a European crowned head, William, King of the Netherlands. It will be found in all the collections of treaties of Great Britain or the United States, and in most of the treaties on extradition, amongst them the useful work by John G. Hawley, Chicago, 1893 (see pp. 119 sqq.).

up to justice all persons . . . charged with murder or assault with intent to commit murder, or piracy or arson or robbery or forgery or the utterance of forged paper. . . . Power was given to judges and other magistrates to issue warrants of arrest, to hear evidence and if "the evidence be deemed sufficient . . . it shall be the duty of the . . . judge or magistrate to certify the same to the proper executive authority that a warrant may issue for the surrender of such fugitive."

It will be seen that this treaty made two important changes so far as the United States was concerned: (1) It made it the duty of the executive to order extradition in a proper case and took away the discretion, (2) it gave the courts jurisdiction to determine whether a case was made out for extradition.³⁴ These changes made it more difficult in many instances for a refugee to escape: but as ever the courts were astute in finding reasons against the return of slaves.

The case of John Anderson is well known. He was born a slave in Missouri. As his master was Moses Burton, he was known as Jack Burton. He married a slave woman in Howard County, the property of one Brown. In 1853 Burton sold him to one McDonald living some thirty miles away and his new master took him to his plantation. In September, 1853, he was seen near the farm of Brown, when apparently he was visiting his wife. A neighbor, Seneca T. P. Diggs, became suspicious of him and questioned him. As his answers were not satisfactory he ordered his four Negro slaves to seize him, according to the law in the State of Missouri. The Negro fled, pursued by Diggs and his

³⁴ It was held in this province that the Act of 1833 was superseded by the Ashburton Treaty in respect to the United States, but that it remained in force with respect to other countries (*Reg. v. Tubber*, 1854, 1, P.R., 98). Since the treaty, our government has refused to extradite where the offense charged is not included in the treaty. In *re Laverne Beebe* (1863), 3, P. R., 273—a case of burglary.

The provisions of the treaty were brought into full effect in Canada (Upper and Lower) by the Canadian Statute of 1849, 12, Vic., c. 19, C. S. C. (1859), c. 89.

slaves. In his attempt to escape the fugitive stabbed Diggs in the breast and Diggs died in a few hours. Effecting his escape to this province, he was in 1860 apprehended in Brant County, where he had been living under the name of John Anderson, and three local justices of the peace committed him under the Ashburton Treaty. A writ of habeas corpus was granted by the Court of Queen's Bench at Toronto, under which the prisoner was brought before the Court of Michaelmas Term of 1860.

The motion was heard by the Full Court.³⁵ Much of the argument was on the facts and on the law apart from the form of the papers, but that was hopeless from the beginning. The law and the facts were too clear, although Mr. Justice McLean thought the evidence defective. The case turned on the form of the information and warrant, a somewhat technical and refined point. The Chief Justice, Sir John Beverley Robinson, and Mr. Justice Burns agreed that the warrant was not strictly correct, but that it could be amended: Mr. Justice McLean thought it could not and should not be amended.

The case attracted great attention throughout the province, especially among the Negro population. On the day on which judgment was to be delivered, a large number of people of color with some whites assembled in front of Osgoode Hall.³⁶ While the adverse decision was announced, there were some mutterings of violence but counsel for the prisoner³⁷ addressed them seriously and impressively, reminding them "It is the law and we must obey it." The

³⁵ Chief Justice Sir John Beverley Robinson, Mr. Justice McLean (afterwards Chief Justice of Upper Canada) and Mr. Justice Burns.

³⁶ The seat of the Superior Courts in Toronto, the Palais de Justice of the Province.

³⁷ Mr. Samuel B. Freeman, Q.C., of Hamilton, a man of much natural eloquence, considerable knowledge of law and more of human nature; he was always ready and willing to take up the cause of one unjustly accused and was singularly successful in his defences.

I have heard it said that it was Mr. M. C. Cameron, Q.C., who so addressed the gathering, but he does not seem to have been concerned in the case in the Queen's Bench.

melancholy gathering melted away one by one in sadness and despair. Anderson was recommitted to the Brantford jail.³⁸ The case came to the knowledge of many in England. It was taken up by the British and Foreign Anti-Slavery Society and many persons of more or less note. An application was made to the Court of Queen's Bench of England for a writ of habeas corpus, notwithstanding the Upper Canadian decision, and while Anderson was in the jail at Toronto, the court after anxious deliberation granted the writ,³⁹ but it became unnecessary, owing to further proceedings in Upper Canada.

In those days the decision of any court or of any judge in habeas corpus proceedings was not final. An applicant might go from judge to judge, court to court⁴⁰ and the last applied to might grant the relief refused by all those previously applied to. A writ of habeas corpus was taken out from the other Common Law Court in Upper Canada, the Court of Common Pleas. This was argued in Hilary Term, 1861, and the court unanimously decided that the warrant of commitment was bad and that the court could not remand the prisoner to have it amended.⁴¹ The prisoner was dis-

³⁸ The case is reported in (1860), 20 Up. Can., Q. B., pp. 124-193. The warrant is given at pp. 192, 193.

³⁹ The case is reported in (1861), 3, Ellis & Ellis Reports, Queen's Bench, p. 487; 30, *Law Jour.*, Q. B., p. 129; 7, *Jurist*, N. S., p. 122; 3, *Law Times*, N. S., p. 622; 9, *Weekly Rep.*, p. 255.

It was owing to this decision that the statute was passed at Westminster (1862) 25, 26, Vic., c. 20, which by sec. 1 forbids the courts in England to issue a writ of habeas corpus into any British possession which has a court with the power to issue such writ. The court was Lord Chief Justice Cockburn, and Justices Crompton, Hill and Blackburn, a very strong court. The Counsel for Anderson was the celebrated but ill-fated Edwin James. The writ was specially directed to the sheriff at Toronto, the sheriff at Brantford and the jail-keeper at Brantford. Judgment was given January 15, 1861.

⁴⁰ Common law, of course, not chancery.

⁴¹ The court was composed of Chief Justice William Henry Draper, C.B., Mr. Justice Richards, afterwards Chief Justice successively of the Court of Common Pleas, of the Court of Queen's Bench, and, as Sir William Buell Richards, of the Supreme Court of Canada, and Mr. Justice Hagarty, afterwards Chief Justice successively of the Court of Common Pleas, of the Court of King's Bench, and, as Sir John Hawkins Hagarty, of Ontario.

Mr. Freeman was assisted in this argument by Mr. M. C. Cameron, a

charged. No other attempts were made to extradite him or any other escaped slave and Lincoln's Emancipation Proclamation put an end to any chance of such an attempt being ever repeated.

W. R. RIDDELL.

lawyer of the highest standing professionally and otherwise, afterwards Justice of the Court of Queen's Bench, and afterwards, as Sir Matthew Cameron, Chief Justice of the Court of Common Pleas. Counsel for the crown on both arguments were Mr. Eccles, Q.C., a man of deservedly high reputation, and Robert Alexander Harrison, afterwards Chief Justice of the Court of Queen's Bench, an exceedingly learned and accurate lawyer.

The case in the Court of Common Pleas is reported in Vol. 11, Upper Can., C. P., pp. 1 sqq.

DOCUMENTS

NOTES ON SLAVERY IN CANADA¹

The following Notes received from the Canadian Archives Department, Ottawa, have more or less bearing upon the question of slavery in Upper Canada:

1. General James Murray, the first Governor of the new Government of Quebec, writing to John Watts, of New York, from Quebec, November 2, 1763, and speaking of the promoting of the improvement of agriculture, says:

"I must most earnestly entreat your assistance, without servants nothing can be done, had I the inclination to employ soldiers which is not the case, they would disappoint me, and Canadians will work for nobody but themselves. Black Slaves are certainly the only people to be depended upon, but it is necessary, I imagine they should be born in one or other of our Northern Colonies, the Winters here will not agree with a Native of the torrid zone, pray therefore if possible procure for me two Stout Young fellows, who have been accustomed to Country Business, and as I shall wish to see them happy, I am of opinion there is little felicity without a Communication with the Ladys, you may buy for each a clean young wife, who can wash and do the female offices about a farm, I shall begrudge no price, so hope we may, by your goodness succeed." (*Can. Arch.*, Murray Papers, Vol. II, p. 15.)

2. D. M. Erskine, writing from New York, May 26, 1807, to Francis Gore, Lt. Governor of Upper Canada, says:

"I have the honour to acknowledge the receipt of your letter of the 24th ult enclosing a Memorial presented to you by the Proprietors of Slaves in the Western District of the Province of Upper Canada.

"I regret equally with yourself the Inconvenience which His

¹ For these documents Mr. Justice Riddell is indebted to Mr. William Smith of the Department of Archives, Ottawa, Canada.

Majesty's subjects in Upper Canada experience from the Desertions of their slaves into the Territory of the United States, and of Persons bound to them for a term of years, as also of His Majesty's soldiers and sailors; but I fear no Representation to the Government of the United States will at the present avail in checking the evils complained of, as I have frequently of late had occasion to apply to them for the Surrender of various Deserters under different circumstances, and always without success—

“The answer that has been usually given, has been. ‘That the Treaty between Great Britain & the United States which *alone* gave them the Power to surrender Deserters having expired, it was impossible for them to exercise such an authority without the Sanction of the Laws—’

“I will however forward to His Majesty's Minister for Foreign Affairs, the Memorial above mentioned in the Hope that some arrangements may be entered into to obviate in future the great Losses which are therein described.” (*Can. Arch.*, Sundries, Upper Canada, 1807.)

3. John Beverley Robinson, Attorney General, Upper Canada, giving an opinion to the Lt. Governor, York, July 8, 1819, says the following:

“May it please Your Excellency

“In obedience to Your Excellency's commands I have perused the accompanying letter from C. C. Antrobus Esquire, His Majesty's Chargé d'affaires at the Court of Washington and have attentively considered the question referred to me by Your Excellency therein—namely—‘Whether the owners of several Negro slaves from the United States of America and are now resident in this Province’ and I beg to express most respectfully my opinion to Your Excellency that the Legislature of this Province having adopted the Law of England as the rule of decision in all questions relative to property and civil rights, and freedom of the person being the most important civil right protected by those laws, it follows that whatever may have been the condition of these Negroes in the Country to which they formerly belonged, here they are free—For the enjoyment of all civil rights consequent to a mere residence in the country and among them the right to personal freedom as acknowledged and protected by the Laws of England in

Cases similar to that under consideration, must notwithstanding any legislative enactment that may be thought to affect it, with which I am acquainted, be extended to these Negroes as well as to all others under His Majesty's Government in this Province—

“The consequence is that should any attempt be made by any person to infringe upon this right in the persons of these Negroes, they would most probably call for, and could compel the interference of those to whom the administration of our Laws is committed and I submit with the greatest deference to Your Excellency that it would not be in the power of the Executive Government in any manner to restrain or direct the Courts or Judges in the exercise of their duty upon such an application.” (*Can. Arch.*, Sundries, Upper Canada, 1819.)

4. At a meeting of the Executive Council of the Province of Lower Canada held at the Council Chamber in the Castle of St. Lewis, on Thursday, June 18, 1829, under Sir James Kempt, the Administrator of the Government, the following proceedings were had:

“Report of a Committee of the whole Council Present The Honble. the Chief Justice in the Chair, Mr. Smith, Mr. DeLery, Mr. Stewart, and Mr. Cochran on Your Excellency's Reference of a Letter from the American Secretary of State requesting that Paul Vallard accused of having stolen a Mulatto Slave from the State of Illinois may be delivered up to the Government of the United States of America together with the Slave.

“May it please Your Excellency

“The Committee have proceeded to the consideration of the subject matter of this reference with every wish and disposition to aid the Officers of the Government of the United States of America in the execution of the Laws of that Dominion and they regret therefore the more that the present application cannot in their opinion be acceded to.

“In the former Cases the Committee have acted upon the Principle which now seems to be generally understood that whenever a Crime has been committed and the Perpetrator is punishable according to the *Lex Loci* of the Country in which it is committed, the country in which he is found may rightfully aid the Police of the Country against which the Crime was committed in bringing the

Criminal to Justice—and upon this ground have recommended that Fugitives from the United States should be delivered up.

“But the Committee conceive that the *Crimes* for which they are authorized to recommend the arrest of Individuals who have fled from other Countries must be such as are *mala in se*, and are universally admitted to be *Crimes* in every Nation, and that the offence of the *Individual* whose person is demanded must be such as to render him liable to arrest by the Law of Canada as well as by the Law of the United States.

“The state of slavery is not recognized by the Law of Canada nor does the Law admit that any Man can be the proprietor of another.

“Every Slave therefore who comes into the Province is immediately free whether he has been brought in by violence or has entered it of his own accord; and his liberty cannot from thenceforth be lawfully infringed without some Cause for which the Law of Canada has directed an arrest.

“On the other hand, the Individual from whom he has been taken cannot pretend that the Slave has been stolen from him in as much as the Law of Canada does not admit a Slave to be a subject of property.

“All of which is respectfully submitted to Your Excellency's Wisdom.” (*Can. Arch.*, State K, p. 406.)

5. At a meeting of the Executive Council for Upper Canada, held at York, on Thursday, September 12, 1833, under Sir John Colborne, Lieutenant Governor, the following proceedings were had:

“Received a Letter from the Governor of the State of Michigan dated Detroit August 12th 1833 with a new requisition for the delivery up of Thornton Blackburn and other fugitives from Justice which was read in Council on 27th August 1833 with the following opinion of the Attorney General, as referred to him 13th July 1833.

“ ‘ATTORNEY GENERAL'S OFFICE

“ ‘12th July 1833

“ ‘Sir

“ ‘I have the Honour to return the various papers relating to the subject of the requisition from the acting Governor of Michigan

demanding that Thornton Blackburn and others who are stated to have fled from the justice of that country and taken refuge within this Province and now in custody at Sandwich should be given up, upon which His Excellency required my opinion whether the Law of this Province authorized him in complying with such demand or not. Had His Excellency been confined to the official requisition and the deposition that accompanied it he might I think have been warranted in delivering up those persons inasmuch as there is thereupon evidence on which according to the terms of our act (3 Wm 4th, C. 8) a magistrate would have been "warranted in apprehending and committing for trial" persons so charged who is convicted of the offence alleged viz: riot and forcible rescue and assault and battery would, if convicted, have been subject according to the Laws of this Province to one of the several punishments enumerated in the act as applicable to felonies and misdemeanors.

"That the Governor and Council are not confined to such evidence is clear since though limited in their authority to enforce the provisions of the act against fugitives from foreign States by the condition above mentioned viz: being satisfied that the evidence would warrant commitment for trial etc. yet in coming to that conclusion they are I think bound to hear no ex parte evidence alone but matter explanatory to guide their judgment; for even tho' satisfied with their authority so to do, they are not required "to deliver up any person so charged if for any reason they shall deem it inexpedient so to do.'

"In the present case I think the evidence on oath as to facts not alluded to in the official Communication and as to the law of the United States upon the subject becomes extremely important; I mean that of Mr Cleland and Mr Alexander Fraser the Attorney for the City of Detroit. The case appears to be this—Two coloured persons named Thornton a man and his wife were claimed as slaves on behalf of some person in the State of Kentucky; that they were arrested and examined before a magistrate in Detroit and he in accordance with the law of the United States made his certificate and directed them to be delivered over as the personal property of the claimant in Kentucky; that the Sheriff took them into custody in consequence and that when one of them, (the man) was on the point of being removed from prison in order to be restored to his owner he was with circumstances of considerable violence rescued and escaped to this Province. There appears to be an error in the

deposition accompanying the requisition, the wife of Thornton is there charged with being one of the persons assisting in the riot and rescue, whereas it appears that previous to the day of her husband's rescue she had eluded the Gaoler in disguise and she was then within this Province; she therefore does not appear to come within the class of offenders which the Act contemplates—viz: 'Malefactors who having committed crimes in foreign Countries have sought an asylum in this Province.'

"With regard to Thornton himself, the Attorney of Detroit who has favoured His Excellency with a certified Copy of the Law of the United States upon the subject, declares,—that the commitment to the custody of the Sheriff was illegal—and this is urged strongly as an equitable consideration against His Excellency's interference that the Sheriff detained Thornton in custody not as Sheriff but as agent for the Slave owner and that the law does not authorize *commitments* under such circumstances to the Sheriff, but merely that 'the owner, agent, or attorney may seize and arrest the fugitive (slave) and take him before the Judge etc: who upon proof that the person seized owes service to the claimant &c shall give a certificate thereof to such claimant, his agent or Attorney which shall be sufficient Warrant for removing the said fugitive from labour &c.'

"To this argument as to the illegality of the custody I do not attach much weight, for admitting that Thornton was not committed to the custody of Mr. Wilson as Sheriff of Wayne County, still as we may presume that the Judge's Certificate was properly given, he might not be the less legally in the custody of Mr Wilson *as agent to the claimant* in Kentucky; for the next section of the act of congress enacts that anyone who '*shall rescue such fugitive from such claimant or his agent &c shall forfeit and pay the sum of five hundred dollars &c.*' That the custody was legal according to the law of the United States I have little doubt; the legality there is officially recognized by the requisition and it is not a subject for His Excellency's enquiry. Upon this view of the case and considering that His Excellency in Council can only restore fugitives charged upon evidence of crimes which if proved to have been committed in this Province would subject the offender to 'Death, Corporal punishment by Pillory or whipping or by confinement at hard labour' and considering this as a Penal Act which must not be strained beyond the literal import towards those against whom it is intended to

operate; the result is that our law recognizes no such custody as that of an agent acting under a warrant for removing a fugitive slave to the Territory from which he fled, this is an offence which could not be committed within this Province in any case and therefore that His Excellency in Council is not by the Act of this Province either required or authorized to deliver up the persons demanded.

“I have the Honor to be, Sir, &c.,

“(Signed) ROBERT S. JAMESON, *Attorney General.*”

“The Council having again had before them the requisition of the Governor of the State of Michigan relative to the escape of certain offenders into this Province deem it mainly important to their full consideration of the question that besides his opinion upon the propriety of giving up the persons alluded to the Attorney General should be requested explicitly to state whether if a similar outrage had been committed in this Province the offender or offenders would be liable to undergo any of the punishments in the act passed last Session.

“(Signed) JOHN STRACHAN, P.C.”

(*Can. Arch.*, State J, p. 137.)

6. At an Executive Council for Upper Canada held at York, Tuesday, September 17, 1833, under the presidency of the Rev. Dr. Strachan, the following proceedings were had:

“The Council assembled agreeably to the desire of His Excellency the Lieutenant Governor to take into consideration the requisition of his Excellency the Governor of Michigan.

“Read the following letter.

“ ‘ATTORNEY GENERAL’S OFFICE

“ ‘14th September, 1833

“ ‘Sir

“ ‘To the question which the Executive Council have done me the honor to submit to me in relation to the requisition from the Governor of Michigan dated 12th August, 1833, whether if a similar outrage had been committed in this Province the offender would be liable to undergo any of the punishments stated in the Act (3 Wm 4, Cap 7) passed at the last Session I have the honor to answer

that a forcible rescue from the custody of the Sheriff of this Province attended with the aggravated circumstances detailed in the affidavit of John M. Wilson and Alexander McArthur accompanying the requisition would undoubtedly subject the offender and those actively aiding and abetting him to the gravest punishment in the act, death alone excepted.

“ ‘I have the honor to be, Sir, &c.,

“ ‘(Signed) ROBERT S JAMESON,

“ ‘*Attorney General.*

“ ‘To John Beikie, Esquire,

“ ‘‘Clerk, Executive Council.’ ”

“ ‘The Council took the same into consideration and were pleased to make the following minute thereon.

“ ‘The Council having had under consideration the requisition of His Excellency the Governor of Michigan together with the various papers relative thereto beg leave respectfully to state that as the question involves matters of great importance in our relations with a neighbouring state it would be satisfactory to them if the opinion of the Judges were obtained for their information.’ ”
(*Can. Arch.*, State J. p. 148.)

7. At an Executive Council for Upper Canada held at York, September 27, 1833, under the presidency of Peter Robinson, the following proceedings were had:

“ ‘Resumed the consideration of His Excellency G. B. Porter, Esquire, Governor of Michigan’s Letter of the 12th Ultimo which was read in Council on the 27th and again on the 12th and 17th Instant.

“ ‘Read also the Attorney General’s opinion of the 20th Instant and the Judges’ Report of this date as follows:

“ ‘ATTORNEY GENERAL’S OFFICE

“ ‘20th September, 1833

“ ‘*Sir*

“ ‘To the question which the Executive Council have done me the Honor to submit to me in relation to the requisition from the Governor of Michigan dated 12th August, 1833, whether if a similar outrage had been committed in this Province, the offender or offenders would be liable to undergo any of the punishments stated

in the Act (3 Wm. 4 c. 7) passed last Session: my opinion is that a forcible rescue from the custody of the sheriff in this Province attended with the aggravated circumstances detailed in the Affidavits of John M. Wilson and Alexander MacArthur though by the law of England it would subject the offender and those actively aiding and abetting him to severe corporal punishment, by the law of the Province as it now stands could not be visited by a graver punishment than fine and imprisonment which is not one of those enumerated in the act.

“ ‘I have the Honor to be, Sir, &c.,

“ ‘(Signed) ROBERT S. JAMESON,

“ ‘*Attorney General.*

“ ‘To

“ ‘John Beikie, Esq.,

“ ‘Clerk, Executive Council.’

“ ‘JUDGES’ REPORT.

“ ‘York, 27th September, 1833.

“ ‘May it please Your Excellency

“ ‘We have the Honor to report to Your Excellency that we have deliberated upon the reference made to us by Your Excellency’s Command on the 17th September Instant in respect to an application addressed to Your Excellency by the Government of the Territory of Michigan requesting that certain persons now inhabiting this Province may be apprehended and sent to that country to answer to a charge preferred against them for assaulting and beating the Sheriff of the County of Wayne and rescuing a prisoner from his custody. We observe that the recent act of the Legislature of this Province intituled “An Act to provide for the apprehending of fugitive offenders from foreign countries and delivering them up to Justice” (a copy of which we annex to this report) gives a discretion to the Governor and Council in carrying into effect its provisions declaring in express terms that it shall not be incumbent upon them to deliver up any person charged if for any reason they shall deem is inexpedient so to do.” We take it for granted however notwithstanding the general terms in which the reference is made to us, that we are not expected to express our opinion upon what would or would not be a proper exercise of this discretion. It does not, indeed, occur to us than any question of political expediency is presented by the case and if any were, we should abstain from offering an opinion upon it.

“‘It is to the legal considerations connected with the case that we have confined ourselves; and in this view of it we beg respectfully to state that these prisoners having been once already apprehended and in custody in this Province upon this same charge and liberated by the decision of the Governor and Council after a consideration of the case upon an application made by the Government of Michigan, we should not think fit that the Governor and Council should authorize a second apprehension of the parties and exercise a second time the power and discretion given by the Act—This course we think could not be approved of unless, in the case of some atrocious offender, new and strong evidence should be discovered which it was not in the power of the foreign Government to produce upon a previous application and for the want of which the prisoners were upon such first application discharged, or perhaps in a case where some official or legal formality had by mere accident been overlooked on the first occasion.

“‘Independently of the consideration that this case has been already acted upon by the Government, the documents before us place it in this light: the prisoners with the exception of Blackburn and his wife are charged with assaulting and beating the sheriff of Wayne and rescuing a prisoner from his custody, Blackburn being the prisoner alluded to is charged with joining in the riot and battery of the Sheriff and with unlawfully rescuing himself—The wife of Blackburn we cannot find to be sufficiently charged with any offence known to our laws which do not acknowledge a state of slavery; for the imputation of conspiring with the rioters and contriving the rescue is supported by no evidence and seems to rest on conjecture—The prisoner Blackburn it appears from the Documents before us was not committed for felony nor for any crime nor imprisoned for any cause which by our laws could be recognized as a justification of imprisonment. We mention this not from any doubt that the prisoner was in legal custody according to the laws of Michigan but because the rescue of a prisoner constitutes by our law a greater or less offence according to the degree of the crime for which he was committed and this prisoner being committed for no crime and certainly not for any felony his rescue would according to our law be a misdemeanor only and a misdemeanor of that kind that the persons convicted of it would be punished by fine and imprisonment or either of them and not by any other description of punishment—The Statute referred to pro-

vides in explicit terms that the persons subject to be delivered up under it to the justice of a foreign country are those only who shall be charged "with murder, forgery, larceny or other crime committed without the jurisdiction of this Province which crimes if committed within this Province would *by the laws thereof* be punishable by *death corporal punishment by pillory or whipping* or by confinement at *hard labour*." We are not aware whether the laws of the Territory of Michigan do or do not authorize the giving up of offenders charged with crimes not embraced in the above very comprehensive description; but however that may be, it is evident that the conduct of this and of other Governments in respect to the delivery up of offenders can be no further reciprocal towards each other than the laws of each will allow. We express no opinion except in reference to the statute recently passed here for regulating this particular matter—We consider the Legislature to have declared in that Statute their will in what cases fugitives from foreign countries should be surrendered; and we have therefore considered whether the persons in question as they are not charged with murder forgery or larceny could upon the facts before us be convicted of any other offence punishable at hard labour—We apprehend they could not be but that the offence of which they might be convicted would be punishable by fine and imprisonment merely without adding "hard labour" to the sentence. Riot, a Battery of the Sheriff in the execution of his duty, and the rescue of a person legally in his custody but not charged with felony or other crime are the offences with which upon the statements before us they are liable to be charged:—and all these are offences which in the known and ordinary administration of the law in this Province would be punished in no other manner than by fine and mere imprisonment. Instances we doubt not may be brought from distant times, in which one or other of the above offences has been punished in England by Pillory or whipping or by other unusual or disgraceful punishments and we do not say that these cases altho' they may be old are so decidedly void of all authority that a judgment which should now be passed in conformity to them would certainly be held to be erroneous and bad. But we conceive that in England such punishments have long ceased to be assigned to the offences in question; that in this Province they have never been assigned to them and that recent Statutes which have been passed in England tend strongly to show that Parliament did not regard them as punish-

ments which in later times could be properly attached to such offences without express Legislative sanction. We observe that there is evidence of one of the persons charged having pointed a loaded pistol at the Sheriff. If it had been further stated that he had pulled the trigger or otherwise attempted to discharge the pistol the act would have been one which in England is felony, having been first made so by Lord Ellenborough's Act passed in 1803; but that Act does not extend to this Province and was never adopted or in force here and if it were otherwise, still this case upon the facts stated is not within it. Looking upon the act of pointing or presenting the pistol as one for which all the rioters were equally responsible it forms an aggravation of their riot and assault but it does not change the legal character of their crime it would probably lead to a higher fine or a longer imprisonment but not to a punishment of another kind. The riot as it is described was an outrageous one and the battery of the sheriff appears to have been violent and cruel—the direct object and intent however seems to have been the rescue of the Prisoner rather than to take the life of the sheriff; and even supposing the facts would well support a conviction for an assault on the Sheriff with an intent to *murder him* still by our law such intent would be merely an aggravation of the riot and assault; it would not alter the technical character of the crime or the description of punishment however much it might enhance the fine or lead to increasing the term of Imprisonment.

“The conclusion therefore which we have come to is that these parties are not charged with any of the offences enumerated in the statute annexed and consequently that the Lieutenant Governor and council are not authorized by its provisions to send them out of the Province. It has not escaped our attention as a peculiar feature in this case that two of the persons whom the Government of this Province is requested to deliver up are persons recognized by the Government of Michigan as slaves and that it appears upon these documents that if they should be delivered up they would by the laws of the United States be exposed to be forced into a state of Slavery from which they had escaped two years ago when they fled from Kentucky to Detroit; that if they should be sent to Michigan and upon trial be convicted of the Riot and punished they would after undergoing their punishment be subject to be taken by their masters and continued in a state of Slavery for life, and that on the other hand if they should never be prosecuted or if they

should be tried and acquitted this consequence would equally follow. Among the Documents before us we perceive there are papers which have been delivered to the Government in behalf of the alleged rioters in which this inevitable consequence is urged as a reason against their being sent back to Michigan and in which it is intimated that to place the slaves again within the power of their masters is the principal object and that the Government of Michigan in making application for them is rather influenced by the interest and wishes of the slave owners than by any desire to bring the parties to trial for the alleged riot. No consideration of this kind has had any weight with us, for in the first place as regards the insinuation against the motives of the Government of Michigan if we had any thing to do with them we should consider (as no doubt this Government would consider in any similar case) that courtesy towards the Government of a foreign country requires always to assume that it has no motive or design on these occasions which is not just and fair and in short none but such as is openly avowed. And in the next place as to the consequence spoken of— If it would follow in course from the laws of the United States it is not probable that the Executive Government there would prevent the slave masters from asserting their rights under those laws and it is therefore reasonable to suppose that the consequence may really follow which the parties concerned have represented. Still if in this case the black people whose arrest is applied for had been shown to have fled from a charge for any such offence as would clearly come within our Statute, we do not conceive that we could on that account have advised a course to be pursued in regard to them different from that which should be pursued with respect to free white persons under the same circumstances. When we say this we should desire it to be understood that we are so clearly of opinion on the other hand, that the withdrawing from a state of Slavery in a foreign Country could not here be treated as an offence with reference to our statute already alluded to so that any person could be surrendered up under that statute upon such a ground merely. We beg leave to express to Your Excellency our regret for the delay that has occurred in answering the reference which Your Excellency and the Honorable the Executive Council have thought fit to make to us. Among other causes which have led to it was a doubt at first entertained among us whether we could properly give an opinion upon a matter which under possible cir-

cumstances might give rise to a judicial proceeding in which the same question would come before us or some one of us for decision. An examination of this subject has removed this doubt and we now submit our opinion to Your Excellency with such explanations as seemed to us to be material.

“ ‘We have the Honor to be

“ ‘Your Excellency’s Most obedient

“ and humble Servants

“ ‘(Signed) “ ‘JOHN B. ROBINSON, C.J.

“ ‘L. P. SHERWOOD—J.

“ ‘J. B. MACAULAY—J.’ ”

“ ‘Upon which the council were pleased to make the following Report.

“ ‘*To His Excellency*, Sir John Colborne, K.C.B., Lieutenant Governor of the Province of Upper Canada and Major General Commanding His Majesty’s Forces therein—&c——&c &c

“ ‘May it please Your Excellency

“ ‘The Council have had under consideration the papers relating to the requisition of the acting Governor of Michigan, together with evidence furnished by His Excellency the Governor of that Territory accompanied by a further requisition for the delivery of the fugitives—they have also had before them the opinions of the three Judges and of the Attorney General with which they concur and have been led to the conclusion that the fugitive Slaves named in the requisitions are not charged with an offence which would have rendered them liable to any of the punishments enumerated in the Provincial Statute and consequently that the Lieutenant Governor and Council are not authorized by its provisions to send them out of the Province.’ ” (*Can. Arch.*, State J, p. 155.)

8. At an Executive Council for Upper Canada held at Toronto, Saturday, September 9, 1837, under the presidency of the Honourable William Allen, the following proceedings were had:

“ ‘Read the Attorney General’s Report of the 8th instant on Documents for the surrender of Jesse Happy, a fugitive from Justice in the United States charged with horse stealing—upon which the Council made the following Report

“The Council have taken into serious consideration the Documents with the Reports of the Attorney General

“A similar application referred for the Report of the Council on the 7th Instant—In that case as in the present it was suggested that the fugitive was a slave, and that the real object of the application was not so much to bring him to trial for the alleged Felony as to reduce him again to a state of Slavery—In that case however it appeared that the Offence had been recently committed viz: in May last—That an early occasion, probably the first, was taken to have him indicted—that process for his apprehension immediately issued and that shortly after the return of the Sheriff to that process the requisition from His Excellency the Governor of the State of Kentucky was obtained and promptly brought to this Province. Under these circumstances the Council were of opinion that in the exercise of a sound discretion they were called upon to recommend to Your Excellency to comply with the requisition—The facts appearing upon the Official Documents in this case are widely different—The Alleged Offence purports to have been committed more than four years ago. When the Indictment was preferred is not shown (as it was in the former case) but the earliest date which shows its existence is 1st June 1835 when the certificate of the Clerk of the Court is given. No process seems to have been issued in the State of Kentucky nor is any other step shown to have been taken until the middle of last month. There also it is suggested that the fugitive is a slave that the real object of his apprehension is to give him up to his former owners and so to deprive him of that personal liberty which the laws of this country secure him. If this be conceded in the present instance after a lapse of four years. no argument could be consistently urged against the delivery up (on the usual application) of persons who have been still longer resident in this Province.

“The delivery of a Slave under these circumstances to the authorities claiming him would it is clear subject him to a double penalty, the one of punishment for a crime, the other of a return to a state of Slavery, even if he should be acquitted. The former in strict accordance with our Statute, the other in direct opposition to the genius of our institutions and the spirit of our Laws. For this cause the Council feel great difficulty in the course which they would advise Your Excellency to adopt, were there any law by which, after taking his trial and if convicted undergoing his sen-

tence he would be restored to a state of freedom, the Council would not hesitate to advise his being given up but there is no such provision in the Statute.

“ ‘On the other hand the Council feel that it cannot be permitted that because a man may happen to be a fugitive slave he should escape those consequences of crime committed in a foreign country to which a free man would be amenable. This would be equally contrary to the Law and to the spirit of mutual justice which gave origin to it, in this Province as well as in the United States. Considering however the circumstances of this case and also the difficulty that might arise from it as a precedent the Council respectfully recommend that time should be given to the accused to furnish affidavits of the facts set forth in the Petition presented on his behalf in order to a full understanding of the whole matter.

“ ‘The Council would further respectfully submit to Your Excellency the propriety of drawing the attention of Her Majesty’s Government to this question with a view of ascertaining their views upon it as a matter of general policy.’ ” (*Can. Arch., State J.* p. 597.)

ADDITIONAL LETTERS OF NEGRO MIGRANTS OF 1916-1918¹

LETTERS STATING THAT WAGES RECEIVED ARE NOT SATISFACTORY

BROOKHAVEN, MISS., April 24, 1917.

Gents: The cane growers of Louisiana have stopped the exodus from New Orleans, claiming shortage of labor which will result in a sugar famine.

Now these laborers thus employed receive only 85 cents a day and the high cost of living makes it a serious question to live.

There is a great many race people around here who desires to come north but have waited rather late to avoid car fare, which they have not got. isnt there some way to get the concerns who wants labor, to send passes here or elsewhere so they can come even if they have to pay out of the first months wages? Please dont publish this letter but do what you can towards helping them to get away. If the R. R. Co. would run a low rate excursion they could leave that way. Please ans.

JACKSONVILLE, FLA., April 4, 1917.

Dear Sir: I have been taking defender for sevel months and I have seen that there is lots good work in that section and I want to say as you are the editor of that paper I wish that you would let me know if there is any wheare up there that I can get in with an intucion that I may get my wife and my silf from down hear and can bring just as miney more as he want we are suffing hear all the work is giveing to poor white peples and we can not get anything to doe at all I will go to pennsylvania or n y state or N J or Ill. or any wheare that I can surport my wife I am past master of son of light in Mass. large Royal arch and is in good standing all so the good Sancer large no. 18. I need helpe my wife cant get

¹ These letters were collected under the direction of Mr. Emmett J. Scott.

THE SLAVE IN UPPER CANADA

By W. R. RIDDELL

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THE SLAVE IN UPPER CANADA

THE SLAVE IN UPPER CANADA*

The dictum of Lord Chief Justice Holt: "As soon as a slave enters England he becomes free"¹ was succeeded by the decision of the Court of King's Bench to the same effect in the celebrated case of *Somerset v. Stewart*² where Lord Mansfield is reported to have said: "The air of England has long been too pure for a slave and every man is free who breathes it."³

James Somerest,⁴ a Negro slave of Charles Stewart in Jamaica, had been brought by his master to England "to attend and abide with him and to carry him back as soon as his business should be transacted." The Negro refused to go back, whereupon he was put in irons and taken on board the ship *Ann and Mary* lying in the Thames and bound for Jamaica. Lord Mansfield granted a writ of habeas corpus requiring Captain Knowles to produce Somerset before him with the cause of the detainer. On the motion, the cause being stated as above indicated, Lord Mansfield re-

* This paper has appeared in *Transactions of the Royal Society of Canada*, May, 1919.

¹ Per Hargrave *arguendo*, *Somerset v. Stewart* (1772), Lofft 1, at p. 4; the speech in the State Trials Report was never actually delivered.

² (1772) Lofft 1; (1772) 20 St. Trials 1.

³ These words are not in Lofft or in the State Trials but will be found in Campbell's *Lives of the Chief Justices*, Vol. II, p. 419, where the words are added: "Every man who comes into England is entitled to the protection of the English law, whatever oppression he may heretofore have suffered and whatever may be the colour of his skin. 'Quamvis ille niger, quamvis tu candidus esses' " and certainly Vergil's verse was never used on a nobler occasion or to nobler purpose. Verg. E. 2, 19.

William Cowper in *The Task*, written 1783-1785, imitated this in his well-known lines:

"Slaves cannot breathe in England; if their lungs
Receive our air, that moment they are free.
They touch our country and their shackles fall."

⁴ I use the spelling in Lofft; the State Trials and Lord Campbell have "Somerset" and "Steuart."

ferred the matter to the Full Court of King's Bench; whereupon, on June 22, 1772, judgment was given for the Negro. The basis of the decision, the theme of the argument, was that the only kind of slavery known to English law was villeinage, that the Statute of Tenures (1660) (12 Car. 11, c. 24) expressly abolished villeins regardant to a manor and by implication villeins in gross. The reasons for the decision would hardly stand fire at the present day. The investigation of Paul Vinogradoff and others have conclusively established that there was not a real difference in status between the so-called villein regardant and villein in gross, and that in any case the villein was not properly a slave but rather a serf.⁵ Moreover, the Statute of Tenures deals solely with tenure and not with status.

But what seems to have been taken for granted, namely that slavery, personal slavery, had never existed in England and that the only unfree person was the villein, who, by the way was real property, is certainly not correct. Slaves were known in England as mere personal goods and chattels, bought and sold, at least as late as the middle of the twelfth century.⁶ However weak the reasons given for the decision, its authority has never been questioned and it is good law. But it is good law for England, for even in the Somerset case it was admitted that a concurrence of unhappy circumstances had rendered slavery necessary⁷ in the American colonies: and Parliament had recognized the right of property in slaves there.⁸

⁵ See, e. g., Vinogradoff, *Villeinage in England*, passim; Hallam's *Middle Ages* (ed. 1827), Vol. 3, p. 256; Pollock & Maitland, *History of English Law*, Vol. 1, pp. 395 sqq. Holdsworth's *History of English Law*, Vol. 2, pp. 33, 63, 131; Vol. 3, pp. 167, 377-393.

⁶ See Pollock & Maitland's *History Eng. Law*, Vol. 1, pp. 1-13, 395, 415; Holdsworth's *Hist. Eng. Law*, Vol. 2, pp. 17, 27, 30-33, 131, 160, 216.

⁷ "So spake the fiend and with necessity,

The tyrant's plea, excused his devilish deeds."

Paradise Lost, Bk. 4, 11. 393, 394.

Milton a true lover of freedom well knew the peril of an argument based upon supposed necessity. Necessity is generally but another name for greed or worse.

⁸ *E. g.*, the Statute of (1732) 5 Geo. II, C. 7, enacted, sec. 4, "that from

When Canada was conquered in 1760, slavery existed in that country. There were not only Panis⁹ or Indian Slaves, but also Negro slaves. These were not enfranchised by the conqueror, but retained their servile status. When the united empire loyalists came to this northern land after the

and after the said 29th. September, 1732, the Houses, Lands, Negroes and other Hereditaments and real Estates situate or being within any of the said (British) Plantations (in America) shall be liable" to be sold under execution. Note that the Negroes are "Hereditaments and Real Estate."

⁹ The name *Pani* or *Panis*, Anglicized into *Pawnee*, was used generally in Canada as synonymous with "Indian Slave" because these slaves were usually taken from the Pawnee tribe. Those who would further pursue this matter will find material in the *Wisconsin Historical Collections*, Vol. XVIII, p. 103 (note); Lafontaine, *L'Esclavage in Canada* cited in the above; *Michigan Pioneer and Historical Collections*, Vol. XXVII, p. 613 (n); Vol. XXX, pp. 402, 596. Vol. XXXV, p. 548; Vol. XXXVII, p. 541. From Vol. XXX, p. 546, we learn that Dr. Anthon, father of Prof. Anthon of Classical Text-book fame, had a "Panie Wench" who when the family had the smallpox "had them very severe" along with Dr. Anthon's little girl and his "aeltest boy" "whoever they got all safe over it and are not disfigured."

Dr. Kingsford in his *History of Canada*, Vol. V, p. 30 (n), cites from the *Documents of the Montreal Historical Society*, Vol. I, p. 5, an "ordonnance au sujet des Nègres et des sauvages appelés panis, du 15 avril 1709" by "Jacques Raudot, Intendant." "Nous sous le bon plaisir de Sa Majesté ordonnons, que tous les Panis et Nègres qui ont été achetés et qui le seront dans la suite, appartiendront en pleine propriété a ceux qui les ont achetés comme étant leurs esclaves." "We with the consent of His Majesty enact that all the Panis and Negroes who heretofore have been or who hereafter shall be bought shall be the absolute property as their slaves of those who bought them." This ordinance is quoted (*Mich. Hist. Coll.*, XII, p. 511), and its language ascribed to a (non-existent) "wise and humane statute of Upper Canada of May 31, 1798"—a curious mistake, perhaps in copying or printing.

There does not seem to have been any distinction in status or rights or anything but race between the Panis and the other slaves. I do not know of an account of the numbers of slaves in Canada at the time; in Detroit, March 31, 1779, there were 60 male and 78 female slaves in a population of about 2,550 (*Mich. Hist. Coll.*, X, p. 326); Nov. 1, 1780, 79 male and 96 female slaves in a somewhat smaller population (*Mich. Hist. Coll.*, XIII, p. 53); in 1778, 127 in a population of 2,144 (*Mich. Hist. Coll.*, IX, p. 469); 85 in 1773, 179 in 1782 (*Mich. Hist. Coll.*, VII, p. 524); 78 male and 101 female (*Mich. Hist. Coll.*, XIII, p. 54). The Ordinance of Congress July 13, 1787, forbidding slavery "northwest of the Ohio River" (passed with but one dissenting voice, that of a Delegate from New York) was quite disregarded in Detroit (*Mich. Hist. Coll.*, I, 415); and indeed Detroit and the neighboring country remained British (de facto) until August, 1796, and part of Upper Canada from 1791 till that date.

acknowledgment by Britain of the independence of the revolted colonies, some of them brought their slaves with them: and the Parliament of Great Britain in 1790 passed an Act authorizing any "subject of . . . the United States of America" to bring into Canada "any negroes" free of duty having first obtained a license from the Lieutenant Governor.¹⁰

An immense territory formerly Canada was erected into a Government or Province of Quebec by Royal Proclamation in 1763 and the limits of the province were extended by the Quebec Act in 1774.¹¹ This province was divided into two provinces, Upper Canada and Lower Canada in 1791.¹² At this time the whole country was under

¹⁰ This Act (1790) 30 Geo. III, c. 27, was intended to encourage "new settlers in His Majesty's Colonies and Plantations in America" and applied to all "subjects of the United States." It allowed an importation into any of the Bahama, Bermuda or Somers Islands, the Province of Quebec (then including all Canada), Nova Scotia and every other British territory in North America. It allowed the importation by such American subjects of "negros, household furniture, utensils of husbandry or cloathing free of duty," the "household furniture, utensils of husbandry and cloathing" not to exceed in value £50 for every white person in the family and £2 for each negro, any sale of negro or goods within a year of the importation to be void.

¹¹ The Royal Proclamation is dated 7th October, 1763; it will be found in Shortt & Doughty, *Documents relating to the Constitutional History of Canada* published by the *Archives of Canada*, Ottawa, 1907, pp. 119 sqq. The Proclamation fixes the western boundary of the (Province or) Government at a line drawn from the south end of Lake Nipissing to where the present international boundary crosses the River St. Lawrence.

The Quebec Act is (1774) 14 Geo. III, C. 83. It extends Quebec south to the Ohio and west to the Mississippi; Shortt & Doughty, pp. 401 sqq.

¹² The division of the Province of Quebec into two provinces, i. e., Upper Canada and Lower Canada, was effected by the Royal Prerogative, Sec. 31 George III. c. 31, the celebrated Canada of Constitutional Act. The Message sent to Parliament expressing the Royal intention is to be found copied in the Ont. Arch. Reports for 1906, p. 158. After the passing of the Canada Act, an Order in Council was passed August 24, 1791 (Ont. Arch. Rep., 1906, pp. 153 et seq.), dividing the Province of Quebec into two provinces and under the provisions of sec. 48 of the act directing a royal warrant to authorize the Governor or Lieutenant-Governor of the Province of Quebec or the person administering the government there, to fix and declare such day as he shall judge most advisable for the commencement of the effect of the legislation in the new provinces not later than December 31, 1791. Lord Dorchester (Sir Guy Carleton) was appointed, September 12, 1791, Captain General and Governor-in-Chief of

the French Canadian law in civil matters. The law of England had been introduced into the old Government of the Province of Quebec by the Royal Proclamation of 1763; but the former French Canadian law had been reintroduced in 1774 by the Quebec Act in matters of property and civil rights, leaving the English criminal law in full force. The law, civil and criminal, had been modified in certain details (not of importance here) by Ordinances of the Governor and Council of Quebec.

The very first act of the first Parliament of Upper Canada reintroduced the English civil law.¹³ This did not destroy slavery, nor did it ameliorate the condition of the slave. Rather the reverse, for as the English law did not, like the civil law of Rome and the systems founded on it, recognize the status of the slave at all, when it was forced by grim fact to acknowledge slavery it had no room for the slave except as a mere piece of property. Instead of giving him rights like those of the "servus," he was deprived of all rights, marital, parental, proprietary, even the right to live. In the English law and systems founded on it, the slave had no rights which the master was bound to respect.¹⁴

both provinces and he received a Royal warrant empowering him to fix a day for the legislation becoming effective in the new provinces (Ont. Arch. Rep., 1906, p. 168). In the absence of Dorchester, General Alured Clarke, Lieutenant Governor of the Province of Quebec, issued November 18, 1791, a proclamation fixing Monday, December 26, 1791, as the day for the commencement of the said legislation (Ont. Arch. Rep., 1906, pp. 169-171). Accordingly technically and in law, the new province was formed by Order in Council, August 24, 1791, but there was no change in administration until December 26, 1791.

¹³ The first session of the First Parliament of Upper Canada was held at Newark (now Niagara-on-the-Lake) September 17 to October 15, 1792; the statute referred to is (1792) 32 Geo. III, c. 1 (U. C.).

¹⁴ Everyone will remember the words of the Chief Justice of the Supreme Court of the United States in the celebrated Dred Scott case. In *Dred Scott v. Sandford*, 1856 (19 How. 354, pp. 404, 405), Chief Justice Roger B. Taney, speaking of the view taken of the Negro when the Constitution was framed, says: "They were at that time considered as a subordinate and inferior class of beings who had been subjugated by the dominant race and whether emancipated or not, yet remained subject to their authority and had no rights or privileges but such as those who held the power and the Government might choose to grant them" (p. 407). "They had no more than a century before been regarded as beings of an inferior order . . . and so far inferior that they had no rights

The first Lieutenant-Governor of Upper Canada was Col. John Graves Simcoe. He hated slavery and had spoken against it in the House of Commons in England. Arriving in Upper Canada in the summer of 1792, he was soon made fully aware that the horrors of slavery were not unknown in his new Province. The following is a report of a meeting of his Executive Council:

“At the Council Chamber, Navy Hall, in the County of Lincoln, Wednesday, March 21st, 1793.

“PRESENT

“His Excellency, J. G. Simcoe, Esq., Lieut.-Governor, &c., &c.,
The Hon^{ble} Wm. Osgoode, Chief Justice
The Hon^{ble} Peter Russell.

“Peter Martin (a negro in the service of Col. Butler) attended the Board for the purpose of informing them of a violent outrage committed by one Fromand, an Inhabitant of this Province, residing near Queens Town, or the West Landing, on the person of Chloe Cooley a Negro girl in his service, by binding her, and violently and forcibly transporting her across the River, and delivering her against her will to certain persons unknown; to prove the truth of his Allegation he produced Wm. Grisley (or Crisley).

“William Grisley an Inhabitant near Mississague Point in this Province says: that on Wednesday evening last he was at work at Mr. Froomans near Queens Town, who in conversation told him, he was going to sell his Negro Wench to some persons in the States, that in the Evening he saw the said Negro girl, tied with a rope, that afterwards a Boat was brought, and the said Frooman with his Brother and one *Vancvery*, forced the said Negro Girl into it, that he was desired to come into the boat, which he did, but did not assist or was otherwise concerned in carrying off the said Negro which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold and treated as an ordinary article of merchandise and traffic” (p. 411). “All of them had been brought here as articles of merchandise.”

This repulsive subject now chiefly of historical interest is treated at large in such works as Cobb's *Law of Slavery*, Philadelphia, 1858; Hurd's *Law of Freedom and Bondage*, Boston, 1858; Von Holst's *Const. Hist. U. S.* (1750-1833), Chicago, 1877; the judgments of all the Judges in the Dred Scott case are well worth reading, especially that of Mr. Justice Curtis.

Girl, but that all the others were, and carried the Boat across the River; that the said Negro Girl was then taken and delivered to a man upon the Bank of the River by Froomand, that she screamed violently and made resistance, but was tied in the same manner as when the said William Grisley first saw her, and in that situation delivered to the man. . . . Wm. Grisley farther says that he saw a negro at a distance, he believes to be tied in the same manner, and has heard that many other People mean to do the same by their Negroes

“*Resolved.*—That it is necessary to take immediate steps to prevent the continuance of such violent breaches of the Public Peace, and for that purpose, that His Majesty’s Attorney-General, be forthwith directed to prosecute the said Fromond.

“Adjourned.”¹⁵

¹⁵ This is copied from the *Canadian Archives Collection*, Q. 282, pt. 1, pp. 212 sqq.; taken from the official report sent to Westminster by Simcoe. There is the usual amount of uncertainty in spelling names Grisley or Crisly, Fromand, Frooman, Froomond or Fromond (in reality Vrooman).

Osgoode was an Englishman, the first Chief Justice of Upper Canada. Arriving in this Province in the summer of 1792, he left to become Chief Justice of Lower Canada in the summer of 1794. Resigning in 1801, he returned to England on a pension which he enjoyed until his death in 1824. He left no mark on our jurisprudence and never sat in any but trial courts of criminal jurisdiction. Osgoode Hall, our Ontario Palais de Justice, is called after him.

Russell came to Upper Canada also in 1792 as Receiver-General and Legislative Councillor; he was an Executive Councillor and when Simcoe left Canada in 1796, he acted as Administrator until the coming of the new Lieutenant Governor Peter Hunter in 1799. Russell was not noted for anything but his acquisitiveness but he was a faithful servant of the Crown in his own way.

Col. John Butler, born in Connecticut in 1728, became a noted leader of Indians. He took the Loyalist side, raising the celebrated Butler’s Rangers; he settled at Niagara after the Revolutionary war and proved himself a useful citizen; he died in 1796. See Cruikshanks’ *Butler’s Rangers*, Lundy’s Lane Historical Society’s publication; Robertson’s *Free Masonry in Canada*, Vol. 1, p. 470; Riddell’s edition of *La Rochefoucauld’s Travels in Canada*, 1795, published by the Ontario Archives, 1917, p. 177.

Navy Hall was in the little town which Simcoe named “Newark,” which before this had been called Niagara. West Niagara, Nassau, Lenox and Butlersburg, now called Niagara or Niagara-on-the-lake. Navy Hall was the seat of government from 1792 to 1797. Queens Town is the present Queenston; Mississagua Point is at the embouchure of the Niagara River; it is still known by the same name, spelled generally however with a final “a.” Nothing seems to be known of the subsequent fate of Chloe Cooley.

The Vroomans and Cryslers (or Chrystlers or Chrysler) the same family as Chrysler of Chrysler’s Farm, the scene of an American defeat, November

The Attorney-General was John White¹⁶ an accomplished English lawyer. He knew that the brutal master was well within his rights in acting as he did. He had the

11, 1813, were well-known residents. I am indebted to General E. A. Cruikshank for the following note:

"The Vrooman Farm is situated on the west bank of the Niagara, in the township of Niagara, about a mile below the village of Queenston, and includes that feature of the river bank generally known as Vrooman's Point; it was still in the possession of the Vrooman family when I last visited the place about twelve years ago. The remains of a small half-moon or redan battery on the point which had been constructed in the War of 1812, and played a considerable part in the battle of Queenston were then quite well marked. One of the Vroomans of that time was in the militia artillery, and assisted to serve the gun mounted on the battery. The possessor of the farm was then, I think, more than eighty years of age, but he was active and in possession of his memory and other faculties. He stated to me the exact number of shots which he had been informed by his father, or the Vrooman engaged in the action, had been fired from this gun, which of course, may or may not be correct. An Adam Chrysler, who was a lieutenant in the Indian Department in the Revolutionary War, and before that, a resident in the Schoharie district, of the Mohawk country, received lands either in the township of Niagara or the township of Stamford, near the village of Queenston. His grandson, John Chrysler, some twenty years ago, then being quite an old man, who is now dead, loaned me some very interesting documents which had been preserved in the family, and belonged to this Adam Chrysler. One of them, I remember, was the original instructions issued to him, and signed by Lieut.-Colonel John Butler, the deputy superintendent general, strictly enjoining him to restrain the Indians, with whom he was acting, from all acts of cruelty upon prisoners and non-combatants. Some members of his family, ladies, were residing at Niagara Falls, Ontario, ten years ago, and I presume still are there. I have no doubt that it was some member of Adam Chrysler's family who took part in the abduction of the Cooley girl. The original spelling of this name was Kreisler, which is a fairly common German name in the Rhine Palatinate, from which this family came."

In the report by Col. John Butler of the Survey of the Settlement at Niagara, August 25, 1782 (*Can. Arch.*, Series B, 169, p. 1), McGregor Van-Every is named as the head of a family. He was married, without children, hired men or slaves, had 3 horses, no cows, sheep or hogs, 8 acres of "clear land" and raised 4 bushels of Indian corn and 40 of potatoes but no wheat or oats. His neighbor, Thomas McMicken, was married, had two young sons, one hired man and one male slave. He had two horses, 1 cow and 20 hogs, and raised ten bushels of Indian corn, 10 of oats and 10 of potatoes (no wheat) on his 8 acres of "clear land."

¹⁶ John White called to the Bar in 1785 at the Inner Temple (probably); he practised for a time but unsuccessfully in Jamaica and through the influence of his brother-in-law, Samuel Shepherd and of Chief Justice Osgoode was appointed the first Attorney General of Upper Canada. He arrived in the

same right to bind, export, and sell his slave as to bind, export, and sell his cow. Chloe Cooley had no rights which Vrooman was bound to respect: and it was no more a breach of the peace than if he had been dealing with his heifer. Nothing came of the direction to prosecute and nothing could be done.

It is probable that it was this circumstance which brought about legislation. At the Second Session of the First Parliament which met at Newark, May 31, 1793, a bill was introduced and unanimously passed the House of Assembly. The trifling amendments introduced by the Legislative Council were speedily concurred in, the royal assent was given July 9, 1793, and the bill became law.¹⁷

Province in the summer of 1792 and was elected a member of the first House of Assembly for Leeds and Frontenac. He was an active and useful member. It is probable, but the existing records do not make it certain, that it was he who introduced and had charge in the House of Assembly of the Bill for the abolition of salvery passed in 1793, shortly to be mentioned. In January, 1800, he was killed in a duel at York, later Toronto, by Major John Small, Clerk of the Executive Council. His will, drawn by himself after his fatal wound, is still extant in the Court of Probate records at Toronto. One clause reads: "I desire to be rolled up in a sheet and not buried fantastically, and that I may be buried at the back of my own house." Buried in his garden at his direction, his bones were accidentally uncovered in 1871 and reverently buried in Toronto. His manuscript diary is still extant, a copy being in the possession of the writer.

¹⁷ The statute is (1793) 33 Geo. III, c. 7, (U. C.). The Parliament of Upper Canada had two Houses, the Legislative Council, an Upper House, appointed by the Crown and the Legislative Assembly, a Lower House or House of Commons, as it was sometimes called, elected by the people. The Lieutenant Governor gave the royal assent. The bill was introduced in the Lower House, probably by Attorney General White, as stated in last note, and read the first time, June 19. It went to the committee of the whole June 25, and was the same day reported out. On June 26 it was read the third time, passed and sent up for concurrence. The Legislative Council read it the same day for the first time, went into Committee over it the next day, June 28, and July 1, when it was reported out with amendments, passed and sent down to the Commons July 2. That House promptly concurred and sent the bill back the same day. See the official reports; *Ont. Arch. Reports* for 1910 (Toronto, 1911), pp. 25, 26, 27, 28, 32, 33, *Ont. Arch. Rep.* for 1909 (Toronto, 1911), pp. 33, 35, 36, 38, 41, 42.

The first Fugitive Slave Law was passed by the United States in 1793. Three years afterwards occurred an episode, little known and less commented upon, showing very clearly the views of George Washington on the subject of fugitive slaves, at least, of those slaves who were his own.

It recited that it was unjust that a people who enjoy freedom by law should encourage the introduction of slaves, and that it was highly expedient to abolish slavery in the

A slave girl of his escaped and made her way to Portsmouth, N. H. Washington, on discovering her place of refuge, wrote concerning her to Joseph Whipple, the Collector at Portsmouth, November 28, 1796. The letter is still extant. It is of three full pages and was sold in London in 1877 for ten guineas (*Magazine of American History*, Vol. 1, December, 1877, p. 759). Charles Sumner had it in his hands when he made the speech reported in Charles Sumner's *Works*, Vol. III, p. 177. Washington in the letter described the fugitive and particularly expressed the desire of "her mistress," Mrs. Washington, for her return to Alexandria. He feared public opinion in New Hampshire, for he added

"I do not mean however, by this request that such violent measures should be used as would excite a mob or riot which might be the case if she has adherents; or even uneasy sensations in the minds of well-disposed citizens. Rather than either of these should happen, I would forgo her services altogether and the example also which is of infinite more importance."

In other words, "if the slave girl has no friends or 'adherents'" send her back to slavery—if she has and they would actively oppose her return, let her go—and even if it only be that "well-disposed citizens" disapprove of her capture and return, let her remain free.

There may be some difficulty in justifying Washington's course by the opinion of Thomas Aquinas (*Summa Theologica*, 1^a m., 2^a d., Quæst. XCVI, Art. 4), who says that an unjust law is not binding in conscience "*nisi forte propter vitandum scandalum vel turbationem*." Aquinas is speaking of an unjust law which may be resisted unless scandal or tumult would result from resistance. Washington is speaking of a law which he considers right, but which he would not enforce if it should occasion such evils. The analogy does not hold as the editor of Charles Sumner's *Works* seems to think (Vol. III, p. 178, note).

Whipple answered from Portsmouth, December 22, 1796:

"I will now, Sir, agreeably to your desire, send her to Alexandria if it be practicable without the consequences which you except—that of exciting a riot or a mob or creating uneasy sensations in the minds of well disposed persons. The first cannot be calculated beforehand; it will be governed by the popular opinion of the moment or the circumstances that may arise in the transaction. The latter may be sought into and judged of by conversing with such persons without discovering the occasion. So far as I have had opportunity, I perceive that different sentiments are entertained on the subject."

Whipple made enquiry. Public opinion in Portsmouth was adverse to the return of the fugitive. She was unmolested and lived out a long life in Portsmouth and Kittery.

Nothing more clearly and impressively shows the veneration felt by his countrymen for George Washington than the praise the fearless, outspoken, uncompromising hater of slavery, Charles Sumner, of the conduct of the President in this transaction. Sumner considered the poor slave girl "a monument

Province so far as it could be done gradually without violating private property; and proceeded to repeal the Imperial Statute of 1790 so far as it related to Upper Canada, and to enact that from and after the passing of the Act, "No Negro or other person who shall come or be brought into this Province . . . shall be subject to the condition of a slave or to" bounden involuntary service for life. With that regard for property characteristic of the English-speaking peoples, the act contained an important proviso which continued the slavery of every "negroe or other person subjected to such service" who has been lawfully brought into the Province. It then enacted that every child born after the passing of the act, of a Negro mother or other woman subjected to such service should become absolutely free on attaining the age of twenty-five, the master in the meantime to provide "proper nourishment and

of the just forbearance of him whom we aptly call Father of his Country. . . . While a slaveholder and seeking the return of a fugitive, he has left in permanent record a rule of conduct which if adopted by his country will make slave hunting impossible." With almost any other man, Sumner would have no praise or reverence for a desire to force a fugitive back into slavery unless prevented by fear of mob or riot or adverse public opinion.

In the same letter Washington gives what may be considered a reason or excuse for his demand. "However well disposed I might be to a gradual abolition, or even to an entire emancipation of that description of people, if the latter was itself practicable at this moment, it would neither be expedient nor just to reward unfaithfulness with a premature preference and thereby discontent beforehand the minds of all her fellow servants who by their steady attachment are far more deserving than herself of favour."

This is the familiar pretext of the master, private or state. Those who rebel against oppression and wrong are not to be given any relief—that would be unjust to those who tamely submit. That very argument was advanced by the ruler across the sea against the proposition to come to terms with Washington and his party who had ventured to oppose the would-be master.

And it is to be noted that Washington did not free those "who by their steady attachment are far more deserving . . . of favour" till he had had all the advantage he could from their services—he did indeed free them by his will, but only after the death of his wife.

Sumner cannot be said to minimize his merits when he says "He was at the time a slaveholder—often expressing himself with various degrees of force against slavery, and promising his suffrage for its abolition, he did not see this wrong as he saw it at the close of life." (Sumner's *Works*, Vol. III, pp. 759 sq.)

cloathing" for the child, but to be entitled to put him to work, all issue of such children to be free whenever born. It further declared any voluntary contract of service or indenture should not be binding longer than nine years. Upper Canada was the first British possession to provide for the abolition of slavery.¹⁸

It will be seen that the Statute did not put an end to slavery at once. Those who were lawfully slaves remained slaves for life unless manumitted and the statute rather discouraged manumission, as it provided that the master on liberating a slave must give good and sufficient security that the freed man would not become a public charge. But, defective as it was, it was not long without attack. In 1798, Simcoe had left the province never to return,¹⁹ and while

¹⁸ Vermont excluded slavery by her Bill of Rights (1777), Pennsylvania and Massachusetts passed legislation somewhat similar to that of Upper Canada in 1780; Connecticut and Rhode Island in 1784, New Hampshire by her Constitution in 1792, Vermont in the same way in 1793; New York began in 1799 and completed the work in 1827, New Jersey 1829; Indiana, Illinois, Michigan, Wisconsin and Iowa were organized as a Territory in 1787 and slavery forbidden by the Ordinance, July 13, 1787, but it was in fact known in part of the Territory for a score of years. A few slaves were held in Michigan by tolerance until far into the nineteenth century notwithstanding the prohibition of the fundamental law (*Mich. Hist. Coll.*, VII, p. 524). Maine as such never had slavery having separated from Massachusetts in 1820 after the Act of 1780, although it would seem that as late as 1833 the Supreme Court of Massachusetts left it open when slavery was abolished in that State (*Commonwealth v. Aves*, 18 Pick. 193, 209). (See Cobb's *Slavery*, pp. clxxi, clxxii, 209; Sir Harry H. Johnston's *The Negro in the New World*, an exceedingly valuable and interesting work but not wholly reliable in minutiae, pp. 355 et seq.)

¹⁹ Simcoe was almost certainly the prime mover in the legislation of 1793. When giving the royal assent to the bill he said: "The Act for the gradual abolition of Slavery in this Colony, which it has been thought expedient to frame, in no respect meets from me a more cheerful concurrence than in that provision which repeals the power heretofore held by the Executive Branch of the Constitution and precludes it from giving sanction to the importation of slaves, and I cannot but anticipate with singular pleasure that such persons as may be in that unhappy condition which sound policy and humanity unite to condemn, added to their own protection from all undue severity by the law of the land may henceforth look forward with certainty to the emancipation of their offspring." (See *Ont. Arch. Rep.* for 1909, pp. 42-43.) I do not understand the allusion to "protection from undue severity by the Law of the land." There had been no change in the law, and undue severity to slaves was prevented only by public opinion. It is practically certain that no such bill as

the government was being administered by the time-serving Peter Russell, a bill was introduced into the Lower House to enable persons "migrating into the province to bring their negro slaves with them." The bill was contested at every stage but finally passed on a vote of eight to four. In the Legislative Council it received the three months' hoist and was never heard of again.²⁰ The argument in favor of

that of 1798 would have been promoted with Simcoe at the head of the government as his sentiments were too well known.

²⁰ *Ont. Arch. Rep.* for 1909, pp. 64, 69, 70, 71, 74; *ibid.* for 1910, pp. 67, 68, 69, 70.

The bill was introduced in the Lower House by Christopher Robinson, member for Addington and Ontario, Ontario being then comprised of the St. Lawrence and Lake Ontario Islands, and having nothing in common with the present County of Ontario. He was a Virginian loyalist, who in 1784 emigrated to New Brunswick, and in 1788 to that part of Canada later Lower Canada and in 1792 to Upper Canada. He lived in Kingston till 1798 and then came to York, later Toronto, but died three weeks afterwards. He was one of the lawyers who took part in the inauguration of the Law Society of Upper Canada at Wilson's Tavern, Newark, in July, 1797, and was an active and successful practitioner. His ability was great, but his fame is swallowed up by that of his more famous son, Sir John Beverley Robinson, the first Canadian Chief Justice of Upper Canada, and of his grandson, the much loved and much admired Christopher Robinson, Q.C., of our own time. Accustomed from infancy to slavery, he saw no great harm in it—no doubt he saw it in its best form.

The chief opponent of the bill was Robert Isaac Dey Gray, the young solicitor general. John White was not in this the second house. The son of Major James Gray, a half-pay British Officer, he studied law in Canada. He was elected member of the House of Assembly for Stormont in the election of 1796 and again in 1804. He was appointed the first Solicitor General in 1797 and was drowned in 1804 in the *Speedy* disaster. An Indian, Ogetonicut, accused of a murder in the Newcastle District, was captured on the York Peninsula, now Toronto or Hiawatha Island, in the Home District, and had to be sent to Newcastle, now Presqu' Isle Point near Brighton, in the Newcastle District, for trial. The Government Schooner *Speedy* sailed for Newcastle with the Assize Judge Gray; Macdonell, who was to defend the Indian; the Indian prisoner, Indian interpreters, witnesses, the High Constable of York and certain inhabitants of York. It was lost, captain, crew and passengers—*spurlos versenkt*.

The motion for the three months' hoist in the Upper House was made by the Honorable Richard Cartwright seconded by the Honorable Robert Hamilton. These men, who had been partners, generally agreed on public measures and both incurred the enmity of Simcoe. He called Hamilton a Republican, then a term of reproach distinctly worse than Pro-German would be now, and

the bill was based on the scarcity of labor which all contemporary writers speak of, the inducement to intending settlers to come to Upper Canada where they would have the same privileges in respect of slavery as in New York and elsewhere; in other words the inevitable appeals to greed.

After this bill became law, slavery gradually disappeared. Public opinion favored manumission and while there were not many manumissions *inter vivos*,²¹ in some measure owing to the provisions of the act requiring security to be given in such case against the freed man becoming a public charge, there were not a few liberations by will.²²

Cartwright was, if anything, worse. But both were men of considerable public spirit and personal integrity. For Cartwright see *The Life and Letters of Hon Richard Cartwright*, Toronto, 1876. For Hamilton see Riddell's edition of La Rochefoucault's *Travels in Canada in 1795*, Toronto, 1817, in *Ont. Arch. Rep.* for 1916; Miss Carnochan's *Queentown in Early Years, Niagara Hist. Soc. Pub.*, No. 25; *Buffalo Hist. Soc. Pub.*, Vol. 6, pp. 73-95.

There was apparently no division in the Upper House although there were five other Councillors in addition to Cartwright and Hamilton in attendance that session viz.: McGill, Shaw, Duncan, Baby and Grant; and the bill passed committee of the whole.

²¹Slaves were valuable even in those days. A sale is recorded in Detroit of a "certain Negro man Pompey by name" for £45 New York Currency (\$112.50) in October, 1794; and the purchaser sold him again January, 1795, for £50 New York Currency (\$125.00). (*Mich. Hist. Coll.*, XIV, p. 417.) But it would seem that from 1770 to 1780 the price ranged to \$300 for a man and \$250 for a woman (*Mich. Hist. Coll.*, XIV, p. 659). The number of slaves in Detroit is said to have been 85 in 1773 and 179 in 1782 (*Mich. Hist. Coll.*, VII, p. 524).

The best people in the province continued to hold slaves. On February 19, 1806, the Honourable Peter Russell, who had been administrator of the government, and therefore head of the State for three years, advertised for sale at York "A Black woman named Peggy, aged 40 years, and a Black Boy, her son, named Jupiter, aged about 15 years," both "his property." "each being servants for life"—the woman for \$150 and the boy for \$200, 25 per cent off for cash. William Jarvis, the secretary, two years later, March 1, 1811, had two of his slaves brought into court for stealing gold and silver out of his desk. The boy "Henry commonly called prince" was committed for trial and the girl ordered back to her master. Other instances will be found in Dr. Scadding's very interesting work, *Toronto of Old*, Toronto, 1873, at pp. 292 sqq.

²²A number of interesting wills are in the Court of Probate files at Osgoode Hall, Toronto. One of them only I shall mention, viz.: that of Robert I. D. Gray, the first solicitor general of the province, whose tragic death is

The number of slaves in Upper Canada was also diminished by what seems at first sight paradoxical, that is, their flight across the Detroit River into American territory. So long as Detroit and its vicinity were British in fact and even for some years later, Section 6 of the Ordinance of 1787 "that there shall be neither slavery nor involuntary servitude in the said territory otherwise than as the punishment of crime" was in great measure a dead letter: but when Michigan was incorporated as a territory in 1805, the ordinance became effective. Many slaves made their way from Canada to Detroit, a real land of the free; so many, indeed, that we find that a company of Negro militia was formed in Detroit in 1806 to assist in the general defence of the territory, composed entirely of escaped slaves from Canada.²³

Almost from the passing of the Canada Act, however, runaway Negroes began to come to Upper Canada, fleeing from slavery; this influx increased and never ceased until the American Civil War gave its death blow to slavery in the United States. Hundreds of blacks thus obtained their freedom, some having been brought by their masters near to the international boundary and then clandestinely or by force effecting a passage; some coming from far to the South, guided by the North Star; many assisted by friends

related above. In this will, dated August 27, 1803, a little more than a year before his death, he releases and manumits "Dorinda my black woman servant . . . and all her children from the State of Slavery," in consequence of her long and faithful services to his family. He directs a fund to be formed of £1,200 or \$4,800 the interest to be paid to "the said Dorinda her heirs and Assigns for ever." To John Davis, Dorinda's son, he gave 200 acres of land, Lot 17 in the Second Concession of the Township of Whitby and also £50 or \$200. John, after the death of his master whose body servant and valet he was, entered the employ of Mr., afterwards Chief, Justice Powell; but he had the evil habit of drinking too much and when he was drunk he would enlist in the Army. Powell got tired of begging him off and after a final warning left him with the regiment in which he had once more enlisted. Davis is said to have been in the battle of Waterloo. He certainly crossed the ocean and returned later on to Canada. He survived till 1871, living at Cornwall, Ontario, a well-known character. With him died the last of all those who had been slaves in the old Province of Quebec or the Province of Upper Canada.

²³ *Mich. Hist. Coll.*, XIV, p. 659.

more or less secretly. The Underground Railroad was kept constantly running.²⁴ These refugees joined settlements with other people of color freeborn or freed in the western part of the Peninsula, in the counties of Essex and Kent and elsewhere.²⁵ Some of them settled in other parts of the province, either together or more usually sporadically.

At the time of the outbreak of the Civil War there were many thousands of black refugees in the province.²⁶ More than half of these were manumitted slaves who in consequence of unjust laws had been forced to leave their State. While some of such freedmen went to the Northern States, most came to Canada, some returning to the Northern States. The Negro refugees were superior to most of their race, for none but those with more than ordinary qualities could reach Canada.²⁷

The masters of runaway slaves did not always remain quiet when their slave reached this province. Sometimes they followed him in an attempt to take him back. There are said to have been a few instances of actual kidnapping,

²⁴ A fairly good account of the Underground Railroad will be found in William Still's *Underground Railroad*, Philadelphia, 1872, in W. M. Mitchell's *Underground Railway*, London, 1860; in W. H. Siebert's *Underground Railway*, New York, 1899; and in a number of other works on Slavery. Considerable space is given the subject in most works on slavery.

One branch of it ran from a point on the Ohio River, through Ohio and Michigan to Detroit; but there were many divagations, many termini, many stations: Oberlin was one of these. See Dr. A. M. Ross' *Memoirs of a Reformer*, Toronto, 1893, and *Mich. Hist. Coll.*, XVII, p. 248.

²⁵ The Buxton Mission in the County of Kent is well known. The Wilberforce Colony in the County of Middlesex was founded by free Negroes; but they had in mind to furnish homes for future refugees. See Mr. Fred Landon's account of this settlement in the recent (1918) *Transactions of the London and Middlesex Hist. Soc.*, pp. 30-44. For an earlier account see A. Steward's *Twenty Years a Slave*, Rochester, N. Y., 1857.

²⁶ Ross in his *Memoirs* gives, on page 111, 40,000, but he may be speaking for all Canada. The number is rather high for Upper Canada alone.

²⁷ "The Kingdom of heaven suffereth violence and the violent take it by force." There can be no doubt that the Southern Negro looked upon Canada as a paradise. I have heard a colored clergyman of high standing say that of his own personal knowledge, dying slaves in the South not infrequently expressed a hope to meet their friends in Canada.

a few of attempted kidnapping.²⁸ There have been cases in which criminal charges have been laid against escaped slaves, and their extradition sought, ostensibly to answer the criminal charges. It has always been the theory in this province that the governor has the power independently of statute or treaty to deliver up alien refugees charged with crime.²⁹ To make it clear, the Parliament of Upper Canada in 1833 passed an Act for the apprehension of fugitive offenders from foreign countries, and delivering them up to justice.³⁰ This provides that on the requisition of the executive of any foreign country the governor of the province on the advice of his executive council may deliver up any person in the province charged with "Murder, Forgery, Larceny or other crime which if committed within the Province would have been punishable with death, cor-

²⁸ These being merely traditional and not supported by contemporary documents are more or less mythical and I do not attempt to collect the various and varying stories.

There are several stories more or less well authenticated of masters bringing slaves into Canada with the intention of taking them back again as Charles Stewart intended with his slave James Somerset and the slaves successfully asserting their freedom, resisting removal with the assistance of Canadians. Of one of the most shocking cases of wrong, if not quite kidnapping, a citizen of Toronto was the subject. John Mink, a respectable man with some Negro blood, had a livery stable on King Street, Toronto. He was also the proprietor of stage-coach lines and a man of considerable wealth. He had an only daughter of great personal beauty, and showing little trace of Negro origin. It was understood that she would marry no one but a white man, and that the father was willing to give her a handsome dowry on such a marriage. A person of pure Caucasian stock from the Southern States came to Toronto, wooed and won her. They were married and the husband took his bride to his home in the South. Not long afterwards the father was horrified to learn that the plausible scoundrel had sold his wife as a slave. He at once went South and after great exertion and much expense, he succeeded in bringing back to his house the unhappy woman, the victim of brutal treachery.

There have been told other stories of the same kind, equally harrowing, and unfortunately not ending so well, but I have not been able to verify them. The one mentioned here I owe to the late Sir Charles Moss, Chief Justice of Ontario.

²⁹ The same rule obtained in Lower Canada; (1827) re Joseph Fisher, 1 Stuart's L. C. Rep. 245.

³⁰ This is the Act (1833), 3 Will IV, c. 7 (U. C.). This came forward as cap. 96 in the Consolidated Statutes of Upper Canada 1859, but was repealed by an Act of (United) Canada (1860), 23 Vic., c. 91 (Can.).

poral punishment, the Pillory, whipping or confinement at hard labour." The person charged might be arrested and detained for inquiry. The Act was permissive only and the delivery up was at the discretion of the governor.

When this act was in force Solomon Mosely or Moseby, a Negro slave, came to the Province across the Niagara River from Buffalo which he had reached after many days' travel from Louisville, Kentucky. His master followed him and charged him with the larceny of a horse which the slave took to assist him in his flight. That he had taken the horse there was no doubt, and as little that after days of hard riding he had sold it. The Negro was arrested and placed in Niagara jail; a *prima facie* case was made out and an order sent for his extradition.

The people of color of the Niagara region made Mosely's case their own and determined to prevent his delivery up to the American authorities to be taken to the land of the free and the home of the brave, knowing that there for him to be brave meant torture and death, and that death alone could set him free. Under the leadership of Herbert Holmes, a yellow man,³¹ a teacher and preacher, they lay around the jail night and day to the number of from two to four hundred to prevent the prisoner's delivery up. At length the deputy sheriff with a military guard brought out the unfortunate man shackled in a wagon from the jail yard, to go to the ferry across the Niagara River. Holmes and a man of color named Green grabbed the lines. Deputy Sheriff McLeod from his horse gave the order to fire and charge. One soldier shot Holmes dead and another bayoneted Green, so that he died almost at once. Mosely, who was very athletic, leaped from the wagon and made his escape. He went to Montreal and afterwards to England, finally returning to Niagara, where he was joined by his wife, who also escaped from slavery.

An inquest was held on the bodies of Holmes and Green.

³¹ To his people he seems to have been known as Hubbard Holmes; he is always called a yellow man, whether mulatto, quadroon, octoroon or other does not appear.

The jury found "justifiable homicide" in the case of Holmes; "whether justifiable or unjustifiable there was not sufficient evidence before the jury to decide" in the case of Green. The verdict in the case of Holmes was the only possible verdict on the admitted facts. Holmes was forcibly resisting an officer of the law in executing a legal order of the proper authority. In the case of Green the doubt arose from the uncertainty whether he was bayoneted while resisting the officers or after Mosely had made his escape. The evidence was conflicting and the fact has never been made quite clear. No proceedings were taken against the deputy sheriff; but a score or more of the people of color were arrested and placed in prison for a time. The troublous times of the Mackenzie Rebellion came on, the men of color were released, many of them joining a Negro militia company which took part in protecting the border.

The affair attracted much attention in the province and opinions differed. While there were exceptions on both sides, it may fairly be said that the conservative and government element reproached the conduct of the blacks in the strongest terms, being as little fond of mob law as of slavery, and that the radicals, including the followers of Mackenzie, looked upon Holmes and Green as martyrs in the cause of liberty. That Holmes and Green and their fellows violated the law there is no doubt, but so did Oliver Cromwell, George Washington and John Brown. Every one must decide for himself whether the occasion justified in the courts of Heaven an act which must needs be condemned in the courts of earth.³²

³² The contemporary accounts of this transaction, *e. g.*, in the *Christian Guardian* of Toronto, and the *Niagara Chronicle*, are not wholly consistent. The main facts, however, are clear. Although there was some doubt as to the time, the military guard were ordered to fire. Miss Janet Carnochan has given a good account of this in *Slave Rescue in Niagara, Sixty Years Ago, Niag. Hist. Soc.*, Pub. No. 2. It is said that "the Judge said he must go back," the fact being that the direction was by the executive and not the courts. The *Reminiscences* of Mrs. J. G. Currie, born at Niagara in 1829 and living there at the time of the trouble, are printed in the *Niagara Hist. Soc.*, Pub. No. 20. Mrs. Currie gives a brief account (p. 331) and says that one of the party, one MacIntyre, had a bullet or bayonet wound in his cheek. In Miss Carnochan's

In 1842 the well-known Ashburton Treaty was concluded³³ between Britain and the United States. This by Article X provides that "the United States and Her Britannic Majesty shall, upon mutual requisitions . . . deliver

account, her informant, who was the daughter of a slave who had escaped in 1802 and was herself born in Niagara in 1824, says that "the sheriff went up and down slashing with his sword and keeping the people back. Many of our people had sword cuts in their necks. They were armed with all kinds of weapons, pitchforks, flails, sticks, stones. One woman had a large stone in a stocking and many had their aprons full of stones and threw them too." Mrs. Anna Jameson, in her *Sketches in Canada*, ed. of 1852, London, on pp. 55-58, gives another account. She rightly makes the extradition order the governor's act, but errs in saying that "the law was too expressly and distinctly laid down and his duty as Governor was clear and imperative to give up the felon" as "by an international compact between the United States and our province, all felons are mutually surrendered." There was nothing in the common law, or in the statute of 1833 which made it the duty of the governor to order extradition, and there was no binding compact between the United States and Upper Canada such as Mrs. Jameson speaks of. No doubt the reason given by her for the order was that in vogue among the official set with whom she associated, her husband being vice-chancellor and head (treasurer) of the Law Society. The *Christian Guardian*, *Niagara Reporter* and *Niagara Chronicle* and *St. Catharines Journal* of September, October and November, 1837, contain accounts of and comments upon the occurrences, and sometimes attacks upon each other.

Deputy Sheriff Alexander McLeod was a man of some note if not notoriety. During the rebellion of 1837 and 1838 he was in the Militia of Upper Canada. He took a creditable part in the defence of Toronto against the followers of Mackenzie in December, 1837, and was afterwards stationed on the Niagara frontier. There he claimed to have taken part in the cutting out of the Steamer *Caroline* in which exploit a Buffalo citizen, Amos Durfee, was killed. McLeod, visiting Lewiston in New York State, in November, 1840, was arrested on the charge of murder and committed for trial. This arrest was the cause of a great deal of communication and discussion between the governments of the United States and of Great Britain, the latter claiming that what had been done by the Canadian militia was a proper public act and they demanded the surrender of McLeod. This was refused. McLeod was tried for murder at Utica, October, 1841, and acquitted, it being conclusively proved that he was not in the expedition at all.

³³ Concluded at Washington, August 9, 1842, ratification exchanged at London, October 13, 1842, proclaimed November 10, 1842; this treaty put an end to many troublesome questions, amongst them the Maine boundary which it was found impracticable to settle by Joint Commissions or by reference to a European crowned head, William, King of the Netherlands. It will be found in all the collections of treaties of Great Britain or the United States, and in most of the treaties on extradition, amongst them the useful work by John G. Hawley, Chicago, 1893 (see pp. 119 sqq.).

up to justice all persons . . . charged with murder or assault with intent to commit murder, or piracy or arson or robbery or forgery or the utterance of forged paper. . . . Power was given to judges and other magistrates to issue warrants of arrest, to hear evidence and if "the evidence be deemed sufficient . . . it shall be the duty of the . . . judge or magistrate to certify the same to the proper executive authority that a warrant may issue for the surrender of such fugitive."

It will be seen that this treaty made two important changes so far as the United States was concerned: (1) It made it the duty of the executive to order extradition in a proper case and took away the discretion, (2) it gave the courts jurisdiction to determine whether a case was made out for extradition.³⁴ These changes made it more difficult in many instances for a refugee to escape: but as ever the courts were astute in finding reasons against the return of slaves.

The case of John Anderson is well known. He was born a slave in Missouri. As his master was Moses Burton, he was known as Jack Burton. He married a slave woman in Howard County, the property of one Brown. In 1853 Burton sold him to one McDonald living some thirty miles away and his new master took him to his plantation. In September, 1853, he was seen near the farm of Brown, when apparently he was visiting his wife. A neighbor, Seneca T. P. Diggs, became suspicious of him and questioned him. As his answers were not satisfactory he ordered his four Negro slaves to seize him, according to the law in the State of Missouri. The Negro fled, pursued by Diggs and his

³⁴ It was held in this province that the Act of 1833 was superseded by the Ashburton Treaty in respect to the United States, but that it remained in force with respect to other countries (*Reg. v. Tubber*, 1854, 1, P.R., 98). Since the treaty, our government has refused to extradite where the offense charged is not included in the treaty. In *re Laverne Beebe* (1863), 3, P. R., 273—a case of burglary.

The provisions of the treaty were brought into full effect in Canada (Upper and Lower) by the Canadian Statute of 1849, 12, Vic., c. 19, C. S. C. (1859), c. 89.

slaves. In his attempt to escape the fugitive stabbed Diggs in the breast and Diggs died in a few hours. Effecting his escape to this province, he was in 1860 apprehended in Brant County, where he had been living under the name of John Anderson, and three local justices of the peace committed him under the Ashburton Treaty. A writ of habeas corpus was granted by the Court of Queen's Bench at Toronto, under which the prisoner was brought before the Court of Michaelmas Term of 1860.

The motion was heard by the Full Court.³⁵ Much of the argument was on the facts and on the law apart from the form of the papers, but that was hopeless from the beginning. The law and the facts were too clear, although Mr. Justice McLean thought the evidence defective. The case turned on the form of the information and warrant, a somewhat technical and refined point. The Chief Justice, Sir John Beverley Robinson, and Mr. Justice Burns agreed that the warrant was not strictly correct, but that it could be amended: Mr. Justice McLean thought it could not and should not be amended.

The case attracted great attention throughout the province, especially among the Negro population. On the day on which judgment was to be delivered, a large number of people of color with some whites assembled in front of Osgoode Hall.³⁶ While the adverse decision was announced, there were some mutterings of violence but counsel for the prisoner³⁷ addressed them seriously and impressively, reminding them "It is the law and we must obey it." The

³⁵ Chief Justice Sir John Beverley Robinson, Mr. Justice McLean (afterwards Chief Justice of Upper Canada) and Mr. Justice Burns.

³⁶ The seat of the Superior Courts in Toronto, the Palais de Justice of the Province.

³⁷ Mr. Samuel B. Freeman, Q.C., of Hamilton, a man of much natural eloquence, considerable knowledge of law and more of human nature; he was always ready and willing to take up the cause of one unjustly accused and was singularly successful in his defences.

I have heard it said that it was Mr. M. C. Cameron, Q.C., who so addressed the gathering, but he does not seem to have been concerned in the case in the Queen's Bench.

melancholy gathering melted away one by one in sadness and despair. Anderson was recommitted to the Brantford jail.³⁸ The case came to the knowledge of many in England. It was taken up by the British and Foreign Anti-Slavery Society and many persons of more or less note. An application was made to the Court of Queen's Bench of England for a writ of habeas corpus, notwithstanding the Upper Canadian decision, and while Anderson was in the jail at Toronto, the court after anxious deliberation granted the writ,³⁹ but it became unnecessary, owing to further proceedings in Upper Canada.

In those days the decision of any court or of any judge in habeas corpus proceedings was not final. An applicant might go from judge to judge, court to court⁴⁰ and the last applied to might grant the relief refused by all those previously applied to. A writ of habeas corpus was taken out from the other Common Law Court in Upper Canada, the Court of Common Pleas. This was argued in Hilary Term, 1861, and the court unanimously decided that the warrant of commitment was bad and that the court could not remand the prisoner to have it amended.⁴¹ The prisoner was dis-

³⁸ The case is reported in (1860), 20 Up. Can., Q. B., pp. 124-193. The warrant is given at pp. 192, 193.

³⁹ The case is reported in (1861), 3, Ellis & Ellis Reports, Queen's Bench, p. 487; 30, *Law Jour.*, Q. B., p. 129; 7, *Jurist*, N. S., p. 122; 3, *Law Times*, N. S., p. 622; 9, *Weekly Rep.*, p. 255.

It was owing to this decision that the statute was passed at Westminster (1862) 25, 26, Vic., c. 20, which by sec. 1 forbids the courts in England to issue a writ of habeas corpus into any British possession which has a court with the power to issue such writ. The court was Lord Chief Justice Cockburn, and Justices Crompton, Hill and Blackburn, a very strong court. The Counsel for Anderson was the celebrated but ill-fated Edwin James. The writ was specially directed to the sheriff at Toronto, the sheriff at Brantford and the jail-keeper at Brantford. Judgment was given January 15, 1861.

⁴⁰ Common law, of course, not chancery.

⁴¹ The court was composed of Chief Justice William Henry Draper, C.B., Mr. Justice Richards, afterwards Chief Justice successively of the Court of Common Pleas, of the Court of Queen's Bench, and, as Sir William Buell Richards, of the Supreme Court of Canada, and Mr. Justice Hagarty, afterwards Chief Justice successively of the Court of Common Pleas, of the Court of King's Bench, and, as Sir John Hawkins Hagarty, of Ontario.

Mr. Freeman was assisted in this argument by Mr. M. C. Cameron, a

charged. No other attempts were made to extradite him or any other escaped slave and Lincoln's Emancipation Proclamation put an end to any chance of such an attempt being ever repeated.

W. R. RIDDELL.

lawyer of the highest standing professionally and otherwise, afterwards Justice of the Court of Queen's Bench, and afterwards, as Sir Matthew Cameron, Chief Justice of the Court of Common Pleas. Counsel for the crown on both arguments were Mr. Eccles, Q.C., a man of deservedly high reputation, and Robert Alexander Harrison, afterwards Chief Justice of the Court of Queen's Bench, an exceedingly learned and accurate lawyer.

The case in the Court of Common Pleas is reported in Vol. 11, Upper Can., C. P., pp. 1 sqq.

NOTES ON SLAVERY IN CANADA¹

The following Notes received from the Canadian Archives Department, Ottawa, have more or less bearing upon the question of slavery in Upper Canada:

1. General James Murray, the first Governor of the new Government of Quebec, writing to John Watts, of New York, from Quebec, November 2, 1763, and speaking of the promoting of the improvement of agriculture, says:

"I must most earnestly entreat your assistance, without servants nothing can be done, had I the inclination to employ soldiers which is not the case, they would disappoint me, and Canadians will work for nobody but themselves. Black Slaves are certainly the only people to be depended upon, but it is necessary, I imagine they should be born in one or other of our Northern Colonies, the Winters here will not agree with a Native of the torrid zone, pray therefore if possible procure for me two Stout Young fellows, who have been accustomed to Country Business, and as I shall wish to see them happy, I am of opinion there is little felicity without a Communication with the Ladys, you may buy for each a clean young wife, who can wash and do the female offices about a farm, I shall begrudge no price, so hope we may, by your goodness succeed." (*Can. Arch.*, Murray Papers, Vol. II, p. 15.)

2. D. M. Erskine, writing from New York, May 26, 1807, to Francis Gore, Lt. Governor of Upper Canada, says:

"I have the honour to acknowledge the receipt of your letter of the 24th ult enclosing a Memorial presented to you by the Proprietors of Slaves in the Western District of the Province of Upper Canada.

"I regret equally with yourself the Inconvenience which His

¹ For these documents Mr. Justice Riddell is indebted to Mr. William Smith of the Department of Archives, Ottawa, Canada.

Majesty's subjects in Upper Canada experience from the Desertions of their slaves into the Territory of the United States, and of Persons bound to them for a term of years, as also of His Majesty's soldiers and sailors; but I fear no Representation to the Government of the United States will at the present avail in checking the evils complained of, as I have frequently of late had occasion to apply to them for the Surrender of various Deserters under different circumstances, and always without success—

“The answer that has been usually given, has been. ‘That the Treaty between Great Britain & the United States which *alone* gave them the Power to surrender Deserters having expired, it was impossible for them to exercise such an authority without the Sanction of the Laws—’

“I will however forward to His Majesty's Minister for Foreign Affairs, the Memorial above mentioned in the Hope that some arrangements may be entered into to obviate in future the great Losses which are therein described.” (*Can. Arch.*, Sundries, Upper Canada, 1807.)

3. John Beverley Robinson, Attorney General, Upper Canada, giving an opinion to the Lt. Governor, York, July 8, 1819, says the following:

“May it please Your Excellency

“In obedience to Your Excellency's commands I have perused the accompanying letter from C. C. Antrobus Esquire, His Majesty's Chargé d'affaires at the Court of Washington and have attentively considered the question referred to me by Your Excellency therein—namely—‘Whether the owners of several Negro slaves from the United States of America and are now resident in this Province’ and I beg to express most respectfully my opinion to Your Excellency that the Legislature of this Province having adopted the Law of England as the rule of decision in all questions relative to property and civil rights, and freedom of the person being the most important civil right protected by those laws, it follows that whatever may have been the condition of these Negroes in the Country to which they formerly belonged, here they are free—For the enjoyment of all civil rights consequent to a mere residence in the country and among them the right to personal freedom as acknowledged and protected by the Laws of England in

Cases similar to that under consideration, must notwithstanding any legislative enactment that may be thought to affect it, with which I am acquainted, be extended to these Negroes as well as to all others under His Majesty's Government in this Province—

“The consequence is that should any attempt be made by any person to infringe upon this right in the persons of these Negroes, they would most probably call for, and could compel the interference of those to whom the administration of our Laws is committed and I submit with the greatest deference to Your Excellency that it would not be in the power of the Executive Government in any manner to restrain or direct the Courts or Judges in the exercise of their duty upon such an application.” (*Can. Arch., Sundries, Upper Canada, 1819.*)

4. At a meeting of the Executive Council of the Province of Lower Canada held at the Council Chamber in the Castle of St. Lewis, on Thursday, June 18, 1829, under Sir James Kempt, the Administrator of the Government, the following proceedings were had:

“Report of a Committee of the whole Council Present The Honble. the Chief Justice in the Chair, Mr. Smith, Mr. DeLery, Mr. Stewart, and Mr. Cochran on Your Excellency's Reference of a Letter from the American Secretary of State requesting that Paul Vallard accused of having stolen a Mulatto Slave from the State of Illinois may be delivered up to the Government of the United States of America together with the Slave.

“May it please Your Excellency

“The Committee have proceeded to the consideration of the subject matter of this reference with every wish and disposition to aid the Officers of the Government of the United States of America in the execution of the Laws of that Dominion and they regret therefore the more that the present application cannot in their opinion be acceded to.

“In the former Cases the Committee have acted upon the Principle which now seems to be generally understood that whenever a Crime has been committed and the Perpetrator is punishable according to the *Lex Loci* of the Country in which it is committed, the country in which he is found may rightfully aid the Police of the Country against which the Crime was committed in bringing the

Criminal to Justice—and upon this ground have recommended that Fugitives from the United States should be delivered up.

“But the Committee conceive that the *Crimes* for which they are authorized to recommend the arrest of Individuals who have fled from other Countries must be such as are *mala in se*, and are universally admitted to be *Crimes* in every Nation, and that the offence of the *Individual* whose person is demanded must be such as to render him liable to arrest by the Law of Canada as well as by the Law of the United States.

“The state of slavery is not recognized by the Law of Canada nor does the Law admit that any Man can be the proprietor of another.

“Every Slave therefore who comes into the Province is immediately free whether he has been brought in by violence or has entered it of his own accord; and his liberty cannot from thenceforth be lawfully infringed without some Cause for which the Law of Canada has directed an arrest.

“On the other hand, the Individual from whom he has been taken cannot pretend that the Slave has been stolen from him in as much as the Law of Canada does not admit a Slave to be a subject of property.

“All of which is respectfully submitted to Your Excellency's Wisdom.” (*Can. Arch.*, State K, p. 406.)

5. At a meeting of the Executive Council for Upper Canada, held at York, on Thursday, September 12, 1833, under Sir John Colborne, Lieutenant Governor, the following proceedings were had:

“Received a Letter from the Governor of the State of Michigan dated Detroit August 12th 1833 with a new requisition for the delivery up of Thornton Blackburn and other fugitives from Justice which was read in Council on 27th August 1833 with the following opinion of the Attorney General, as referred to him 13th July 1833.

“ ‘ATTORNEY GENERAL'S OFFICE

“ ‘12th July 1833

“ ‘Sir

“ ‘I have the Honour to return the various papers relating to the subject of the requisition from the acting Governor of Michigan

demanding that Thornton Blackburn and others who are stated to have fled from the justice of that country and taken refuge within this Province and now in custody at Sandwich should be given up, upon which His Excellency required my opinion whether the Law of this Province authorized him in complying with such demand or not. Had His Excellency been confined to the official requisition and the deposition that accompanied it he might I think have been warranted in delivering up those persons inasmuch as there is thereupon evidence on which according to the terms of our act (3 Wm 4th, C. 8) a magistrate would have been "warranted in apprehending and committing for trial" persons so charged who is convicted of the offence alleged viz: riot and forcible rescue and assault and battery would, if convicted, have been subject according to the Laws of this Province to one of the several punishments enumerated in the act as applicable to felonies and misdemeanors.

"That the Governor and Council are not confined to such evidence is clear since though limited in their authority to enforce the provisions of the act against fugitives from foreign States by the condition above mentioned viz: being satisfied that the evidence would warrant commitment for trial etc. yet in coming to that conclusion they are I think bound to hear no ex parte evidence alone but matter explanatory to guide their judgment; for even tho' satisfied with their authority so to do, they are not required "to deliver up any person so charged if for any reason they shall deem it inexpedient so to do."

"In the present case I think the evidence on oath as to facts not alluded to in the official Communication and as to the law of the United States upon the subject becomes extremely important; I mean that of Mr Cleland and Mr Alexander Fraser the Attorney for the City of Detroit. The case appears to be this—Two coloured persons named Thornton a man and his wife were claimed as slaves on behalf of some person in the State of Kentucky; that they were arrested and examined before a magistrate in Detroit and he in accordance with the law of the United States made his certificate and directed them to be delivered over as the personal property of the claimant in Kentucky; that the Sheriff took them into custody in consequence and that when one of them, (the man) was on the point of being removed from prison in order to be restored to his owner he was with circumstances of considerable violence rescued and escaped to this Province. There appears to be an error in the

deposition accompanying the requisition, the wife of Thornton is there charged with being one of the persons assisting in the riot and rescue, whereas it appears that previous to the day of her husband's rescue she had eluded the Gaoler in disguise and she was then within this Province; she therefore does not appear to come within the class of offenders which the Act contemplates—viz: 'Malefactors who having committed crimes in foreign Countries have sought an asylum in this Province.'

"With regard to Thornton himself, the Attorney of Detroit who has favoured His Excellency with a certified Copy of the Law of the United States upon the subject, declares,—that the commitment to the custody of the Sheriff was illegal—and this is urged strongly as an equitable consideration against His Excellency's interference that the Sheriff detained Thornton in custody not as Sheriff but as agent for the Slave owner and that the law does not authorize *commitments* under such circumstances to the Sheriff, but merely that 'the owner, agent, or attorney may seize and arrest the fugitive (slave) and take him before the Judge etc: who upon proof that the person seized owes service to the claimant &c shall give a certificate thereof to such claimant, his agent or Attorney which shall be sufficient Warrant for removing the said fugitive from labour &c.'

"To this argument as to the illegality of the custody I do not attach much weight, for admitting that Thornton was not committed to the custody of Mr. Wilson as Sheriff of Wayne County, still as we may presume that the Judge's Certificate was properly given, he might not be the less legally in the custody of Mr Wilson *as agent to the claimant* in Kentucky; for the next section of the act of congress enacts that anyone who '*shall rescue such fugitive from such claimant or his agent &c shall forfeit and pay the sum of five hundred dollars &c.*' That the custody was legal according to the law of the United States I have little doubt; the legality there is officially recognized by the requisition and it is not a subject for His Excellency's enquiry. Upon this view of the case and considering that His Excellency in Council can only restore fugitives charged upon evidence of crimes which if proved to have been committed in this Province would subject the offender to 'Death, Corporal punishment by Pillory or whipping or by confinement at hard labour' and considering this as a Penal Act which must not be strained beyond the literal import towards those against whom it is intended to

operate; the result is that our law recognizes no such custody as that of an agent acting under a warrant for removing a fugitive slave to the Territory from which he fled, this is an offence which could not be committed within this Province in any case and therefore that His Excellency in Council is not by the Act of this Province either required or authorized to deliver up the persons demanded.

“I have the Honor to be, Sir, &c.,

“(Signed) ROBERT S. JAMESON, *Attorney General*.”

“The Council having again had before them the requisition of the Governor of the State of Michigan relative to the escape of certain offenders into this Province deem it mainly important to their full consideration of the question that besides his opinion upon the propriety of giving up the persons alluded to the Attorney General should be requested explicitly to state whether if a similar outrage had been committed in this Province the offender or offenders would be liable to undergo any of the punishments in the act passed last Session.

“(Signed) JOHN STRACHAN, P.C.”

(*Can. Arch.*, State J, p. 137.)

6. At an Executive Council for Upper Canada held at York, Tuesday, September 17, 1833, under the presidency of the Rev. Dr. Strachan, the following proceedings were had:

“The Council assembled agreeably to the desire of His Excellency the Lieutenant Governor to take into consideration the requisition of his Excellency the Governor of Michigan.

“Read the following letter.

““ATTORNEY GENERAL’S OFFICE

““14th September, 1833

““Sir

““To the question which the Executive Council have done me the honor to submit to me in relation to the requisition from the Governor of Michigan dated 12th August, 1833, whether if a similar outrage had been committed in this Province the offender would be liable to undergo any of the punishments stated in the Act (3 Wm 4, Cap 7) passed at the last Session I have the honor to answer

that a forcible rescue from the custody of the Sheriff of this Province attended with the aggravated circumstances detailed in the affidavit of John M. Wilson and Alexander McArthur accompanying the requisition would undoubtedly subject the offender and those actively aiding and abetting him to the gravest punishment in the act, death alone excepted.

“ ‘I have the honor to be, Sir, &c.,

“ ‘(Signed) ROBERT S JAMESON,

“ ‘*Attorney General.*

“ ‘To John Beikie, Esquire,

“ ‘Clerk, Executive Council.’ ”

“ ‘The Council took the same into consideration and were pleased to make the following minute thereon.

“ ‘The Council having had under consideration the requisition of His Excellency the Governor of Michigan together with the various papers relative thereto beg leave respectfully to state that as the question involves matters of great importance in our relations with a neighbouring state it would be satisfactory to them if the opinion of the Judges were obtained for their information.’ ”
(*Can. Arch.*, State J. p. 148.)

7. At an Executive Council for Upper Canada held at York, September 27, 1833, under the presidency of Peter Robinson, the following proceedings were had:

“ ‘Resumed the consideration of His Excellency G. B. Porter, Esquire, Governor of Michigan’s Letter of the 12th Ultimo which was read in Council on the 27th and again on the 12th and 17th Instant.

“ ‘Read also the Attorney General’s opinion of the 20th Instant and the Judges’ Report of this date as follows:

“ ‘ATTORNEY GENERAL’S OFFICE

“ ‘20th September, 1833

“ ‘Sir

“ ‘To the question which the Executive Council have done me the Honor to submit to me in relation to the requisition from the Governor of Michigan dated 12th August, 1833, whether if a similar outrage had been committed in this Province, the offender or offenders would be liable to undergo any of the punishments stated

in the Act (3 Wm. 4 c. 7) passed last Session: my opinion is that a forcible rescue from the custody of the sheriff in this Province attended with the aggravated circumstances detailed in the Affidavits of John M. Wilson and Alexander MacArthur though by the law of England it would subject the offender and those actively aiding and abetting him to severe corporal punishment, by the law of the Province as it now stands could not be visited by a graver punishment than fine and imprisonment which is not one of those enumerated in the act.

“ ‘I have the Honor to be, Sir, &c.,

“ ‘(Signed) ROBERT S. JAMESON,

“ ‘*Attorney General.*

“ ‘To

“ ‘John Beikie, Esq.,

“ ‘Clerk, Executive Council.’

“ ‘JUDGES’ REPORT.

“ ‘York, 27th September, 1833.

“ ‘May it please Your Excellency

“ ‘We have the Honor to report to Your Excellency that we have deliberated upon the reference made to us by Your Excellency’s Command on the 17th September Instant in respect to an application addressed to Your Excellency by the Government of the Territory of Michigan requesting that certain persons now inhabiting this Province may be apprehended and sent to that country to answer to a charge preferred against them for assaulting and beating the Sheriff of the County of Wayne and rescuing a prisoner from his custody. We observe that the recent act of the Legislature of this Province intituled “An Act to provide for the apprehending of fugitive offenders from foreign countries and delivering them up to Justice” (a copy of which we annex to this report) gives a discretion to the Governor and Council in carrying into effect its provisions declaring in express terms that it shall not be incumbent upon them to deliver up any person charged if for any reason they shall deem is inexpedient so to do.” We take it for granted however notwithstanding the general terms in which the reference is made to us, that we are not expected to express our opinion upon what would or would not be a proper exercise of this discretion. It does not, indeed, occur to us than any question of political expediency is presented by the case and if any were, we should abstain from offering an opinion upon it.

“ ‘It is to the legal considerations connected with the case that we have confined ourselves; and in this view of it we beg respectfully to state that these prisoners having been once already apprehended and in custody in this Province upon this same charge and liberated by the decision of the Governor and Council after a consideration of the case upon an application made by the Government of Michigan, we should not think fit that the Governor and Council should authorize a second apprehension of the parties and exercise a second time the power and discretion given by the Act—This course we think could not be approved of unless, in the case of some atrocious offender, new and strong evidence should be discovered which it was not in the power of the foreign Government to produce upon a previous application and for the want of which the prisoners were upon such first application discharged, or perhaps in a case where some official or legal formality had by mere accident been overlooked on the first occasion.

“ ‘Independently of the consideration that this case has been already acted upon by the Government, the documents before us place it in this light: the prisoners with the exception of Blackburn and his wife are charged with assaulting and beating the sheriff of Wayne and reseuing a prisoner from his custody, Blackburn being the prisoner alluded to is charged with joining in the riot and battery of the Sheriff and with unlawfully reseuing himself—The wife of Blackburn we cannot find to be sufficiently charged with any offence known to our laws which do not acknowledge a state of slavery; for the imputation of conspiring with the rioters and contriving the rescue is supported by no evidence and seems to rest on conjecture—The prisoner Blackburn it appears from the Documents before us was not committed for felony nor for any crime nor imprisoned for any cause which by our laws could be recognized as a justification of imprisonment. We mention this not from any doubt that the prisoner was in legal custody according to the laws of Michigan but because the rescue of a prisoner constitutes by our law a greater or less offence according to the degree of the crime for which he was committed and this prisoner being committed for no crime and certainly not for any felony his rescue would according to our law be a misdemeanor only and a misdemeanor of that kind that the persons convicted of it would be punished by fine and imprisonment or either of them and not by any other description of punishment—The Statute referred to pro-

vides in explicit terms that the persons subject to be delivered up under it to the justice of a foreign country are those only who shall be charged "with murder, forgery, larceny or other crime committed without the jurisdiction of this Province which crimes if committed within this Province would *by the laws thereof* be punishable by *death corporal punishment by pillory or whipping* or by confinement at *hard labour*." We are not aware whether the laws of the Territory of Michigan do or do not authorize the giving up of offenders charged with crimes not embraced in the above very comprehensive description; but however that may be, it is evident that the conduct of this and of other Governments in respect to the delivery up of offenders can be no further reciprocal towards each other than the laws of each will allow. We express no opinion except in reference to the statute recently passed here for regulating this particular matter—We consider the Legislature to have declared in that Statute their will in what cases fugitives from foreign countries should be surrendered; and we have therefore considered whether the persons in question as they are not charged with murder forgery or larceny could upon the facts before us be convicted of any other offence punishable at hard labour—We apprehend they could not be but that the offence of which they might be convicted would be punishable by fine and imprisonment merely without adding "hard labour" to the sentence. Riot, a Battery of the Sheriff in the execution of his duty, and the rescue of a person legally in his custody but not charged with felony or other crime are the offences with which upon the statements before us they are liable to be charged:—and all these are offences which in the known and ordinary administration of the law in this Province would be punished in no other manner than by fine and mere imprisonment. Instances we doubt not may be brought from distant times, in which one or other of the above offences has been punished in England by Pillory or whipping or by other unusual or disgraceful punishments and we do not say that these cases altho' they may be old are so decidedly void of all authority that a judgment which should now be passed in conformity to them would certainly be held to be erroneous and bad. But we conceive that in England such punishments have long ceased to be assigned to the offences in question; that in this Province they have never been assigned to them and that recent Statutes which have been passed in England tend strongly to show that Parliament did not regard them as punish-

ments which in later times could be properly attached to such offences without express Legislative sanction. We observe that there is evidence of one of the persons charged having pointed a loaded pistol at the Sheriff. If it had been further stated that he had pulled the trigger or otherwise attempted to discharge the pistol the act would have been one which in England is felony, having been first made so by Lord Ellenborough's Act passed in 1803; but that Act does not extend to this Province and was never adopted or in force here and if it were otherwise, still this case upon the facts stated is not within it. Looking upon the act of pointing or presenting the pistol as one for which all the rioters were equally responsible it forms an aggravation of their riot and assault but it does not change the legal character of their crime it would probably lead to a higher fine or a longer imprisonment but not to a punishment of another kind. The riot as it is described was an outrageous one and the battery of the sheriff appears to have been violent and cruel—the direct object and intent however seems to have been the rescue of the Prisoner rather than to take the life of the sheriff; and even supposing the facts would well support a conviction for an assault on the Sheriff with an intent *to murder him* still by our law such intent would be merely an aggravation of the riot and assault; it would not alter the technical character of the crime or the description of punishment however much it might enhance the fine or lead to increasing the term of Imprisonment.

“The conclusion therefore which we have come to is that these parties are not charged with any of the offences enumerated in the statute annexed and consequently that the Lieutenant Governor and council are not authorized by its provisions to send them out of the Province. It has not escaped our attention as a peculiar feature in this case that two of the persons whom the Government of this Province is requested to deliver up are persons recognized by the Government of Michigan as slaves and that it appears upon these documents that if they should be delivered up they would by the laws of the United States be exposed to be forced into a state of Slavery from which they had escaped two years ago when they fled from Kentucky to Detroit; that if they should be sent to Michigan and upon trial be convicted of the Riot and punished they would after undergoing their punishment be subject to be taken by their masters and continued in a state of Slavery for life, and that on the other hand if they should never be prosecuted or if they

should be tried and acquitted this consequence would equally follow. Among the Documents before us we perceive there are papers which have been delivered to the Government in behalf of the alleged rioters in which this inevitable consequence is urged as a reason against their being sent back to Michigan and in which it is intimated that to place the slaves again within the power of their masters is the principal object and that the Government of Michigan in making application for them is rather influenced by the interest and wishes of the slave owners than by any desire to bring the parties to trial for the alleged riot. No consideration of this kind has had any weight with us, for in the first place as regards the insinuation against the motives of the Government of Michigan if we had any thing to do with them we should consider (as no doubt this Government would consider in any similar case) that courtesy towards the Government of a foreign country requires always to assume that it has no motive or design on these occasions which is not just and fair and in short none but such as is openly avowed. And in the next place as to the consequence spoken of—If it would follow in course from the laws of the United States it is not probable that the Executive Government there would prevent the slave masters from asserting their rights under those laws and it is therefore reasonable to suppose that the consequence may really follow which the parties concerned have represented. Still if in this case the black people whose arrest is applied for had been shown to have fled from a charge for any such offence as would clearly come within our Statute, we do not conceive that we could on that account have advised a course to be pursued in regard to them different from that which should be pursued with respect to free white persons under the same circumstances. When we say this we should desire it to be understood that we are so clearly of opinion on the other hand, that the withdrawing from a state of Slavery in a foreign Country could not here be treated as an offence with reference to our statute already alluded to so that any person could be surrendered up under that statute upon such a ground merely. We beg leave to express to Your Excellency our regret for the delay that has occurred in answering the reference which Your Excellency and the Honorable the Executive Council have thought fit to make to us. Among other causes which have led to it was a doubt at first entertained among us whether we could properly give an opinion upon a matter which under possible cir-

cumstances might give rise to a judicial proceeding in which the same question would come before us or some one of us for decision. An examination of this subject has removed this doubt and we now submit our opinion to Your Excellency with such explanations as seemed to us to be material.

“We have the Honor to be

“Your Excellency’s Most obedient

“and humble Servants

“(Signed) “JOHN B. ROBINSON, C.J.

“L. P. SHERWOOD—J.

“J. B. MACAULAY—J.”

“Upon which the council were pleased to make the following Report.

“*To His Excellency, Sir John Colborne, K.C.B., Lieutenant Governor of the Province of Upper Canada and Major General Commanding His Majesty’s Forces therein—&c——&c &c*

“May it please Your Excellency

“The Council have had under consideration the papers relating to the requisition of the acting Governor of Michigan, together with evidence furnished by His Excellency the Governor of that Territory accompanied by a further requisition for the delivery of the fugitives—they have also had before them the opinions of the three Judges and of the Attorney General with which they concur and have been led to the conclusion that the fugitive Slaves named in the requisitions are not charged with an offence which would have rendered them liable to any of the punishments enumerated in the Provincial Statute and consequently that the Lieutenant Governor and Council are not authorized by its provisions to send them out of the Province.’” (*Can. Arch.*, State J, p. 155.)

8. At an Executive Council for Upper Canada held at Toronto, Saturday, September 9, 1837, under the presidency of the Honourable William Allen, the following proceedings were had:

“Read the Attorney General’s Report of the 8th instant on Documents for the surrender of Jesse Hapoy, a fugitive from Justice in the United States charged with horse stealing—upon which the Council made the following Report

“The Council have taken into serious consideration the Documents with the Reports of the Attorney General

“A similar application referred for the Report of the Council on the 7th Instant—In that case as in the present it was suggested that the fugitive was a slave, and that the real object of the application was not so much to bring him to trial for the alleged Felony as to reduce him again to a state of Slavery—In that case however it appeared that the Offence had been recently committed viz: in May last—That an early occasion, probably the first, was taken to have him indicted—that process for his apprehension immediately issued and that shortly after the return of the Sheriff to that process the requisition from His Excellency the Governor of the State of Kentucky was obtained and promptly brought to this Province. Under these circumstances the Council were of opinion that in the exercise of a sound discretion they were called upon to recommend to Your Excellency to comply with the requisition—The facts appearing upon the Official Documents in this case are widely different—The Alleged Offence purports to have been committed more than four years ago. When the Indictment was preferred is not shown (as it was in the former case) but the earliest date which shows its existence is 1st June 1835 when the certificate of the Clerk of the Court is given. No process seems to have been issued in the State of Kentucky nor is any other step shown to have been taken until the middle of last month. There also it is suggested that the fugitive is a slave that the real object of his apprehension is to give him up to his former owners and so to deprive him of that personal liberty which the laws of this country secure him. If this be conceded in the present instance after a lapse of four years, no argument could be consistently urged against the delivery up (on the usual application) of persons who have been still longer resident in this Province.

“The delivery of a Slave under these circumstances to the authorities claiming him would it is clear subject him to a double penalty, the one of punishment for a crime, the other of a return to a state of Slavery, even if he should be acquitted. The former in strict accordance with our Statute, the other in direct opposition to the genius of our institutions and the spirit of our Laws. For this cause the Council feel great difficulty in the course which they would advise Your Excellency to adopt, were there any law by which, after taking his trial and if convicted undergoing his sen-

tence he would be restored to a state of freedom, the Council would not hesitate to advise his being given up but there is no such provision in the Statute.

“ ‘On the other hand the Council feel that it cannot be permitted that because a man may happen to be a fugitive slave he should escape those consequences of crime committed in a foreign country to which a free man would be amenable. This would be equally contrary to the Law and to the spirit of mutual justice which gave origin to it, in this Province as well as in the United States. Considering however the circumstances of this case and also the difficulty that might arise from it as a precedent the Council respectfully recommend that time should be given to the accused to furnish affidavits of the facts set forth in the Petition presented on his behalf in order to a full understanding of the whole matter.

“ ‘The Council would further respectfully submit to Your Excellency the propriety of drawing the attention of Her Majesty’s Government to this question with a view of ascertaining their views upon it as a matter of general policy.’ ” (*Can. Arch.*, State J, p. 597.)

THE SLAVE IN CANADA

BY

THE HONORABLE WILLIAM RENWICK RIDDELL

LL.D.; F. R. HIST. SOC.; F. R. SOC. CAN.; &C., &C.

JUSTICE OF THE SUPREME COURT OF ONTARIO

Reprinted from THE JOURNAL OF NEGRO HISTORY, Vol. V, No. 3, July, 1920

THE ASSOCIATION FOR THE STUDY OF NEGRO
LIFE AND HISTORY

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PREFACE

When engaged in a certain historical inquiry, I found occasion to examine the magnificent collection of the Canadian Archives at Ottawa, a collection which ought not to be left unexamined by anyone writing on Canada. In that inquiry I discovered the proceedings in the case of Chloe Cooley set out in Chapter V of the text. This induced me to make further researches on the subject of slavery in Upper Canada. The result was incorporated in a paper, *The Slave in Upper Canada*, read before the Royal Society of Canada in May 1919, and subsequently published in the JOURNAL OF NEGRO HISTORY for October, 1919. Some of the Fellows of the Royal Society of Canada and the editor of the JOURNAL OF NEGRO HISTORY have asked me to expand the paper. The present work is the result.

I have spent many happy hours in the Canadian Archives and have read all and copied most of the documents referred to in this book; and I cannot omit to thank the officers at Ottawa for their courtesy in forwarding my labor of love, in furnishing me with copies, photographic and otherwise, and in unearthing interesting facts. It will not be considered invidious if I mention William Smith, Esq., I.S.O. and Miss Smillie, M.A., as specially helpful. My thanks are also due to Messrs. Herrington, K.C., of Nananee, F. Landon, M.A., of London, Mrs. Hallam and Mrs. Seymour Corley of Toronto, General Cruikshank of Ottawa, the Very Reverend Dean Raymond of Victoria, as well as to many others of whose labors I have taken advantage. This general acknowledgment will, I trust, be accepted in lieu of special and particular acknowledgment from time to time.

The chapter on the Maritime Provinces is almost wholly taken from the Reverend Dr. T. Watson Smith's paper on *Slavery in Canada* in the *Nova Scotia Historical Society's Collections*, Vol. X, Halifax, 1899.

WILLIAM RENWICK RIDDELL

OSGOODE HALL,

TORONTO, February 5, 1920



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THE SLAVE IN CANADA

CHAPTER I

BEFORE THE CONQUEST

That slavery existed in Canada before its conquest by Britain in 1759-60, there can be no doubt, although curiously enough it has been denied by some historians and essayists.¹ The first Negro slave of which any account is given was brought to Quebec by the English in 1628. He was a young man from Madagascar and was sold in Quebec for 50 half crowns.² Sixty years thereafter in 1688, Denonville, the Governor and DeChampigny, the Intendant of New France, wrote to the French Secretary of State, complaining of the dearness and scarcity of labor, agricultural and domestic, and suggesting that the best remedy would be to have Negro slaves. If His Majesty would

¹ For example in Garneau's *Histoire du Canada* (1st Edit) Vol. 2, p. 447 after speaking of correspondence of 1688-9 referred to in the text he says of the answer of the authorities in Paris:

“C'était assez pour faire échouer une entreprise, qui aurait greffé sur notre société la grande et terrible plaie qui paralyse la force d'une portion si considérable de l'Union Américaine, l'esclavage, cette plaie inconnue sous notre ciel du Nord”—“That was effective to strand a scheme which would have engrafted upon our society that great and terrible plague which paralyses the energies of so considerable a part of the American Union, Slavery, that plague unknown under our northern sky.”

² He was sold by David Kertk or Kirke the first English Conqueror of Quebec. England held her conquest only from 1629 to 1632, if it be permissible to call Kirke's possession that of England when he was repudiated by his country. *Relations des Jesuites*, 1632, p. 12: do. do. 1633, p. 25. Much of the information which follows concerning slavery in Quebec is taken from a paper in the *Memoirs of the Historical Society of Montreal*, 1859, *De L'esclavage en Canada*, written by M. Jacques Viger and Sir L. H. LaFontaine. I have made an independent investigation and am satisfied that the facts are truly stated. This general acknowledgment will prevent the necessity of particular reference.

In a local history of Montreal, *Memoirs de la Société Historique de Montreal*, 1869, p. 200, there is a reference to Panis slaves in Montreal in 1670.

agree to that course, some of the principal inhabitants would have some bought in the West Indies on the arrival of the Guinea ships. The minister replied in 1689 in a note giving the King's consent but drawing attention to the danger of the slaves coming from so different a climate dying in Canada and thereby rendering the experiment of no avail.³

The Indians were accustomed to make use of slaves, generally if not universally of those belonging to other tribes: and the French Canadians frequently bought Indian slaves from the aborigines. These were called "Panis."⁴ It would seem that a very few Indians were directly enslaved by the inhabitants: but the chief means of acquiring Panis was purchase from *les sauvages*.

The property in slaves was well recognized in International Law. We find that in the Treaty of Peace and Neutrality in America signed at London, November 16, 1686,⁵ between the Kings of France and England, which James II had arranged shortly after attaining the throne,

³ "Mais il est bon de leur faire remarquer qu'il est à craindre que ces nègres, venant d'un climat si différent, ne périssent en Canada et le projet serait alors inutile." "Il est à craindre" that the prospect of "le projet" being "inutile" was more alarming than that of "ces nègres" perishing in frozen Canada.

⁴ The name Pani or Panis, Anglicized into Pawnee, was used generally in Canada as synonymous with "Indian Slave" because these slaves were usually taken from the Pawnee tribe. It is held by some that the Panis were a tribe wholly distinct from the tribe known among the English as Pawnees—e.g., Drake's *History of the Indians of North America*. Those who would further pursue this matter will find material in the *Wisconsin Historical Collections*, Vol. XVIII, p. 103 (note); Viger and Lafontaine, *L'Esclavage en Canada* cited above n. 2; *Michigan Pioneer and Historical Collections*, Vol. XXVII, p. 613 (n); Vol. XXX, pp. 402, 596; Vol. XXXV, p. 548; Vol. XXXVII, p. 541. From Vol. XXX, p. 546, we learn that Dr. Anthon, father of Prof. Anthon of Classical Text-book fame, had a "Panie Wench" who, when the family had the smallpox "had them very severe" along with Dr. Anthon's little girl and his "æltest boy"—"whaever they got all safe over it and are not disfigured." Thwaites, an exceedingly careful writer, in his edition of *Long's Travels*, Cleveland, 1904, says in a note on page 117; "Indian Slavery among the French was first practised in the Illinois Country." He gives no authority and I know of none.

⁵ Referred to in Chalmers' *Collection of Treaties between Great Britain and Other Powers*, London, 1790, p. 328: Pap. Off. B. 25.

Article 10 provides that the subjects of neither nation should take away the savage inhabitants, or their slaves or the goods which the savages had taken belonging to the subjects of either nation, and that they should give no assistance or protection to such raids and pillage. In 1705 it was decided that Negroes in America were "moveables," meubles, corresponding in substance to what is called "personal property" in the English law.⁶ This decision was on the *Coutume de Paris*, the law of New France.

The Panis and Negro slaves were not always obedient. Jacques Randot, the Intendant, April 13, 1709, made an ordinance on "the Subject of Negroes and Savages called Panis." In this he recited the advantage the colony would acquire by certainty of ownership of the savages called Panis "whose nation is far removed from this country" and that certainty could only be brought about through the Indians who capture them in their homes and deal for the most part with the English of Carolina, but who sometimes in fact sell them to the Canadians who are often defrauded of considerable sums through an idea of liberty inspired in the Panis by those who do not buy,⁷ so that almost daily they leave their masters under the pretext that there are no slaves in France—that is not wholly true since in the islands of this Continent all the Negroes bought as such are regarded as slaves.

The further recital says that all the colonies should be on the same footing, and that the Panis were as necessary for the Canadians for the cultivation of the land and other work as the Negroes were for the islands, that it was necessary to assure the property in their purchases those who have bought and those who should buy in the future. Then comes the enactment "Nous sous le bon plaisir de Sa

⁶ We shall see later in this work that by the English law, the "villein" was real property and in the same case as land: also that when Parliament came to legislate so as to make lands in the American Colonies liable for debts, "Negroes" were included in "hereditaments" and therefore "real estate."

⁷ Thus early do we find the Abolitionist getting in his fiendish work—the enemy of society, of God and man!

Majesté ordonnons, que tous les Panis et Nègres qui ont été achetés et qui le seront dans la suite, appartiendront en pleine propriété à ceux qui les ont achetés comme étant leurs esclaves.” “We with the consent of His Majesty enact that all the Panis and Negroes who heretofore have been or who hereafter shall be bought shall be the absolute property as their slaves of those who bought them.”⁸

This ordinance was not a dead letter. On February 8, 1734, Gilles Hocquart, the Intendant at Quebec issued an ordinance in which he recited that in 1732 Captain Joanne of the Navy brought a Carib slave of his to Canada and employed him as a sailor; that he had deserted when Captain Joanne was ready to embark for the West Indies; and that the master had seen and recognized him a short time theretofore in the Parish of St. Augustine but on reclaiming him certain evil-disposed persons had facilitated his escape. The ordinance directed all captains and officers of the militia to give their assistance to the master in recovering the Carib slave and forbade all persons to conceal him or facilitate his escape on pain of fine or worse.⁹

Slavery thereafter tended to expand. The Edict of October 1727 concerning the American islands and colonies and therefore including Canada in the preamble spoke of the islands and colonies being in a condition to support a considerable navigation and commerce by the consumption and trade of Negroes, goods and merchandise, and the measures taken to furnish the necessary Negroes, goods

⁸ This ordinance is quoted (*Mich. Hist. Coll.*, XII, p. 511, 517) and its language ascribed to a (non-existent) “wise and humane statute of Upper Canada of May 31, 1798”—a curious mistake, perhaps in copying or printing.

In Kingsford's *History of Canada*, Vol. 2, p. 507, we are told: “In 1718, several young men were prosecuted on account of their relations with Albany carried on through Lake Champlain. One of them, M. de la Découverte, had made himself remarkable by bringing back a Negro slave and some silver ware. One of the New York Livingstones resided in Montreal and was generally the intermediary in these transactions.” The author adds in a note: “This negro must have been among the first brought to Canada.”

⁹ “A peine d'amende arbitraire et de plus grande peine si le cas y escheoit.”

and merchandise. It was decreed that only such Negroes, goods, and merchandise should be received by the islands and colonies as should be brought in French bottoms. Very explicit and rigid regulations were made to that end.

Some of these slaves were too vindictive to be good servants. There is given by Abbé Gosselin in a paper in the *Transactions, Royal Society of Canada for 1900*, an account of a mutiny of part of the garrison at Niagara incited by a Panis probably in the service of an officer at the post. Some of the mutineers were sentenced to death but made their escape while the Panis, Charles, was sent to Martinique with a request to the authorities to make him a slave and to take every precaution that he should not escape to Canada or even to the English colonies. A female slave of color belonging to Mme. de Francheville who had been bought in the English Colonies set fire to her mistress' home the night of the 10-11 April 1734, thus causing a conflagration which destroyed a part of the city of Montreal. The unfortunate slave was apprehended and tried for the crime then and for long after a capital felony. Being found guilty, she was hanged June, 1734.

The increase in the number of slaves made necessary some regulation concerning their liberation. September 1, 1736, Gilles Hocquart, the Intendant already mentioned, made an ordinance concerning the formalities requisite in the enfranchisement of slaves. Reciting that he had been informed that certain persons in Canada had freed their slaves without any other formality than verbally giving them their liberty, and the necessity of fixing in an invariable manner the status of slaves who should be enfranchised, he ordered that for the future all enfranchisements should be by notarial act and that all other attempted enfranchisements should be null and void.

Slaves unable to secure their freedom by legal means, however, undertook sometimes to effect the same by flight. A royal decree of July 23, 1745, recited the escape of three male and one female Negro slaves from the English West

India Island of Antigua to the French Island of Guadeloupe and there sold. There followed a decision of the Superior Council of Guadeloupe that the proceeds of the sale belonged to the King of France and Negro slaves belonging to the enemy when they came into a French colony became at once the property of His Majesty. To make clear the course to pursue for the future, the decree declared that Negro slaves who escape from enemy colonies into French colonies and all they bring with them belong to His Majesty alone in the same way as enemy ships and goods wrecked on his coasts.

With all of this security the ownership of slaves became common. In the Registers of the Parish of La Longue Pointe is found the certificate of the burial, March 13, 1755, of the body of Louise, a female Negro slave, aged 27 days, the property of M. Deschambault. In the same Parish is found the certificate of baptism of Marie Judith, a Panis, about 12 years of age belonging to Sieur Preville of the same Parish, November 4, 1756. On January 22, 1757, one Constant a Panis slave of Sieur de Saint Blain, officer of Infantry, is sentenced by de Monrepos, Lieutenant-Governor civil and criminal in the Jurisdiction of Montreal,¹⁰ to the pillory in a public place on a market day and then to perpetual banishment from the jurisdiction.

The conquest of Canada begun at Quebec in 1759 and completed by the surrender to Amherst of Montreal by de Vaudreuil in 1760 had some bearing on slavery. One of the Articles of Capitulation, the 47th, provided that "the Negroes and Panis of both Sexes shall remain in the possession of the French and Canadians to whom they belong; they shall be at liberty to keep them in their service in the Colony or to sell them: and they may also continue to bring them up in the Roman religion."¹¹

¹⁰ Canada was at this time divided into three Jurisdictions or Districts—those of Quebec, Trois Rivières and Montreal.

¹¹ There are trifling variations in the English text in the several versions in the *Capitulations and Extracts of Treaties relating to Canada, 1797*; *Knox's Journal*, Vol. 2, p. 423: *Documents relative to the Colonial History of*

Having now reached the end of the French period, it will be well to say a word as to the rights of the slaves. There is nowhere any intimation that there was any difference in that regard between the Negro and the Panis. The treatment of the latter by their fellow Indians depended upon the individual master. The Panis had no rights which his Indian master was bound to respect. Remembering the persistence of customs among uncivilized peoples, one may conclude that the description given of slavery among the Chinook Indians about a century later will probably not be far from the mark concerning the Indians of the earlier time and their slaves.

Paul Kane, the celebrated explorer and artist,¹² in a paper read before the Canadian Institute¹³ in 1857 said: "Slavery is carried on to a great extent along the North-

the State of New York, Vol. 10, p. 1107. That in the text is from Shortt & Doughty's *Constitutional Documents 1759-1791, Canadian Archives Publication*, Ottawa, 1907. There is no substantial difference in terminology and none at all in meaning. I give the French version, as to which there is no dispute: "Les Nègres et panis des deux Sexes resteront En leur qualité d'Esclaves, en la possession des françois et Canadiens à qui Ils appartiennent; Il leur Sera libre de les garder à leur Service dans la Colonie ou de les vendre, Et Ils pourront aussi Continuer à les faire Elever dans la Religion Romaine."

¹² The Province of Ontario is the proud possessor of the entire series of Paul Kane's paintings.

¹³ Now the Royal Canadian Institute. The paper appears in Series II of the *Transactions*, Vol. 2, p. 20 (1857).

The use by the Indians of Slaves is noted very early: for example in Galinée's *Narrative* of the extraordinary voyage of LaSalle and others in 1669-70 the travellers are shown to have obtained from the Indians, slaves as guides. See pp. 21, 27, 43 of Coyne's edition, 4 *Ont. Hist. Soc. Papers* (1903). These Indians were accustomed to take their slaves to the Dutch. *Ibid.*, p. 27.

Still there is not very much in the old authors about slavery among the Indians: the references are incidental and fragmentary and the institution is taken for granted. Thus in Lescarbot's *History of New France*, published in 1609, the only reference which I recall is on pp. 270, 449 of The Champlain Society's edition, Toronto, 1914; speaking of the Miamaes the author says: "... the conquerors keep the women and children prisoners ... herein they retain more humanity than is sometimes shown by Christians. For in any case, one should be satisfied to make them slaves as do our savages or to make them purchase their liberty."

West Coast and in Vancouver Island and the Chinooks. . . . The inhabitants still retain a large number of slaves. These are usually procured from the Chastay Tribe who live near the Umqua, a river south of the Columbia emptying into the Pacific. They are sometimes seized by war-parties but are often bought from their own people. . . . Their slavery is of the most abject description: the Chinook men and women treat them with great severity and exercise the power of life and death at pleasure."

Kane gives shocking instances of this. He tells of a chief who sacrificed five slaves to a colossal wooden idol he had set up and says that the unfortunate slaves were not considered entitled even to burial but their bodies were cast out to the crows and vultures.

Amongst the French such an extreme of barbarity did not obtain. Their law was based upon the civil law, that is, the law of Rome, which in its developed form recognized the slave as a human being. The Roman world was full of slaves. Not only were there slaves born but debtors sometimes sold themselves¹⁴ or their children. The criminal might be enslaved. In early pagan times the slave had no rights. He was a chattel disposable according to the will of his master who had *jus vitæ necisque*, who could slay, mutilate, scourge at pleasure.¹⁵ In the course of time

¹⁴ It will be remembered that the ancient law of Rome, the Twelve Tables, authorized creditors to take an insolvent debtor, kill him and divide his body amongst them, a real execution against the person more trenchant if not more effective than the *capias ad satisfaciendum* dear to the English lawyer.

¹⁵ Everyone has shuddered at the awful picture drawn by Juvenal in his Sixth Satire of the fashionable Roman dame who had eight husbands in five years and who ordered her slave to immediate crucifixion. When her husband mildly ventured to suggest that there should at least be some evidence of guilt and that no time should be considered long where the life of a man is in question he was snubbed, just as the Roman lady who was expostulated with for taking her bath in the presence of man slaves asked "*An servus homo?*" The horrible but pithy dialogue reads:

"Pone crucem servo." "Meruit quo crimine servus
Supplicium? Quis testis adest? Quis detulit? Audi.
Nulla umquam de morte hominis cunctatio longa est"
"O demens, ita servus homo est? Nil fecerit, esto.
Hoc volo, sic jubeo, sit pro ratione voluntas."

—*Juvenal, Sat., VI, ll. 219-223.*

this extreme power was restrained. Hadrian forbade the killing of slaves, Marius allowed the slave to lay an information against his master. The prefect at Rome and the presidents of the provinces took cognizance of crimes against the slave: and Constantine allowed a master to go free on killing his slave in chastisement only if he used rods or whips, but not if he used sticks, stones or javelins or tortured him to death.¹⁶ Hard as was his lot, the unhappy

"The cross for the slave!" "What is the charge? What is the evidence? Who laid the information? Hear what he has to say—No delay is ever great where the death of a man is in question." "You driveller! So a slave is a man! Have it your own way—he did nothing. I wish it, that is my order, my wish is a good enough reason."

The natural death for a Roman slave was on the cross or under the scourge.

¹⁶ Constantine also by his Constitution No. 319 provided for slaves becoming free: the Constitution referred to in the text is No. 326. The best short account of slave legislation in Rome which I have seen is in a paper read by the late Vice Chancellor Proudfoot of the Ontario Court of Chancery, February 7, 1891, before the Canadian Institute. *Trans. Can. Ins.*, Series IV, Vol. 2, p. 173. Many of the judgments of Vice Chancellor Proudfoot (venerable nomen) show a profound knowledge and appreciation of the Civil Law.

The following is taken from Prof. Sherman's great work *Roman Law in the Modern World*, Boston, 1917. The learned author has laid philosophical lawyers of all countries under heavy obligations by this splendid book, as noted for its lucidity as for its learning.

Vol. 1, 69. "To inflict unnatural cruelty upon—and finally to kill—a slave was prohibited by Augustus Claudius and Antoninus Pius. Moreover, because by natural law all men were born free and equal (see Digest, 50, 17, 32) the Emperor often restored to slaves the status of a freeborn person."

I, 146. "Constantine . . . abolished crucifixion as a punishment; encouraged the emancipation of slaves. . . ."

I, 150. ". . . It is regrettable that Christianity did not change other parts of the Roman law of persons which ought to have been reformed. The chief example of this failure is slavery, which the law of Justinian fully recognized. The inertia of past centuries as to slavery was too great to be overcome. St. Paul's attitude towards slavery was to recognize the *status quo*, and he did not counsel wholesale emancipation. But Christianity continued the progress of the pagan law along the lines of mercy and kindness, e.g., to poison a slave or brand him was treated in later Imperial Roman law as homicide, and manumission was made easier; but the Church did not recognize the marriage of slaves until over 300 years after Justinian's death."

II, 434, "In Roman law . . . the slave was a thing or chattel—nothing more legally. Slaves could no hold property—slaves could not marry, their actual unions were never legally recognized."

slave had at least some rights in the later civil law, few and slight as they were, and these he had under the *Coutume de Paris*, the law of French Canada.

II, 436, "With the advent of Greek culture and Christianity the harsh manners of ancient Rome became greatly altered."

II, 828, "One feature of the *Lex Aquilia* is . . . that it granted an action in damages for the unlawful killing of . . . the slave of another man." *Inst.*, 413, pr; *Gaius* 3, 210.

II. 829, ". . . the owner had his option either of suing the culprit for damages under the *lex Aquilia* or of causing him to be criminally prosecuted." *Inst.*, 4, 3, 11 *Gaius* 3, 213.

II, 935, "A free person called as a witness could not be subjected to torture, but a slave could be tortured."

CHAPTER II

THE EARLY BRITISH PERIOD

When Canada passed under the British flag by conquest there was for a time confusion as to the law in force. During the military regime from 1760 to 1764 the authorities did the best they could and applied such law as they thought the best for the particular case. There was no dislocation in the common affairs of the country. When Canada was formally ceded to Britain by the Treaty of Paris, 1763,¹ it was not long before there was issued a royal proclamation creating among other things a "Government of Quebec" with its western boundary a line drawn from the "South end of Lake Nipissim"² to the point at which the parallel of 45° north latitude crosses the River St. Lawrence. In all that vast territory the English law, civil and criminal, was introduced.³ It is important now to see what was the law of England at the time respecting slavery.

The dictum of Lord Chief Justice Holt: "As soon as a slave enters England he becomes free,"⁴ was succeeded by the decision of the Court of King's Bench to the same effect in the celebrated case of *Somerset v. Stewart*,⁵ where Lord Mansfield is reported to have said: "The air of England has long been too pure for a slave and every man is free who breathes it."⁶

¹ See this Treaty which was concluded at Paris, February 10, 1763 "au Nom de la Très Sainte & indivisible Trinité, Pere, Fils & Saint Esprit"—Shortt & Doughty, *Constitutional Documents*, 1759-1791, pp. 73 sqq.

² What we now call Lake Nipissing.

³ See the Proclamation, Shortt & Doughty, *Const. Docs.*, pp. 119, sqq.

⁴ Per Hargrave, *arguendo*, *Somerset v. Stewart* (1772), Loftt 1, at p. 4; the speech in the State Trials Report was never actually delivered.

⁵ (1772) Loftt, 12 Geo. III, 1, (1772) 20 St. Trials, 1.

⁶ These words are not in Loftt or in the State Trials, but will be found in Campbell's *Lives of the Chief Justices*, Vol. II, p. 419, where the words are

James Somerset,⁷ a Negro slave of Charles Stewart in Jamaica, "purchased from the African coast in the course of the slave trade as tolerated in the plantations," had been brought by his master to England "to attend and abide with him and to carry him back as soon as his business should be transacted." The Negro refused to go back, whereupon he was put in irons and taken on board the ship *Ann and Mary* lying in the Thames and bound for Jamaica. Lord Mansfield granted a writ of habeas corpus requiring Captain Knowles to produce Somerset before him with the cause of the detainer. On the motion, the cause being stated as above indicated, Lord Mansfield referred the matter to the full court of King's Bench; whereupon, on June 22, 1772, judgment was given for the Negro.⁸ The basis of the decision and the theme of the argument were that the only kind of slavery known to English law was villeinage, that the Statute of Tenures enacted in 1660, expressly abolished villeins regardant to a manor and by implication villeins in gross. The reasons for the decision would hardly stand fire at the present day. The investigation of Paul Vinogradoff and others have conclusively established that there was not a real difference in status

added: "Every man who comes into England is entitled to the protection of the English law, whatever oppression he may heretofore have suffered and whatever may be the color of his skin. *Quamvis ille niger, quamvis tu candidus esses*"—and certainly Vergil's verse was never used to a nobler purpose. Verg. E. 2, 19.

William Cowper in *The Task*, written 1783-1785, imitated this in his well-known lines:

"Slaves cannot breathe in England; if their lungs
Receive our air, that moment they are free.
They touch our country and their shackles fall."

⁷ I use the spelling in Lofft. The State Trials and Lord Campbell have "Somersett" and "Steuart."

⁸ This was in direct opposition to the opinion of Sir Philip Yorke, Attorney General (afterwards Lord Chancellor Lord Hardwicke) and Sir Charles Talbot, Solicitor General (afterwards Lord Chancellor Lord Talbot) who had pledged themselves to the British planters for all the legal consequences of Slaves coming over to England. The law of Scotland agreed with that of England.

between the so-called villein regardant and villein in gross, and that in any case the villein was not properly a slave but rather a serf.⁹ Moreover, the Statute of Tenures deals solely with tenure and not with status.

But what seems to have been taken for granted, namely that slavery, personal slavery, had never existed in England and that the only unfree person was the villein, who, by the way, was real property, is certainly not correct. Slaves were known in England as mere personal goods and chattels, bought and sold, at least as late as the middle of the twelfth century.¹⁰ However weak the reasons given for the decision, its authority has never been questioned and it is good law. But it is good law for England, for even in the Somerset case it was admitted that a concurrence of unhappy circumstances had rendered slavery necessary¹¹ in the American colonies; and Parliament had recognized the right of property in slaves there.¹² Consequently so long as the slaves, Panis or Negro, remained in the colony they were not enfranchised by the law of the conqueror but retained their servile status.

The early records show the use of slaves. General James Murray, who became Governor of the Quebec Forti-

⁹ See e.g., Vinogradoff, *Villeinage in England*, passim. Hallam's *Middle Ages* (ed. 1827), Vol. 3, p. 256; Pollock and Maitland, *History of English Law*, Vol. 1, pp. 395, sqq. Holdsworth's *History of English Law*, Vol. 2, pp. 33, 63, 131; Vol. 3, pp. 167, 377-393.

¹⁰ See Pollock and Maitland's *History Eng. Law*, Vol. 1, pp. 1-13, 395, 415; Holdsworth's *Hist. Eng. Law*, Vol. 2, pp. 17, 27, 30-33, 131, 160, 216.

¹¹ "So spake the fiend and with necessity,

The tyrant's plea, excused his devilish deeds."

Paradise Lost, Bk. 4, ll. 393, 394.

Milton a true lover of freedom well knew the peril of an argument based upon supposed necessity. Necessity is generally but another name for greed or worse.

¹² For example, the Statute of (1732) 5 Geo. II, c. 7, enacted, sec. 4, "that from and after the said 29th September, 1732, the Houses, Lands, Negroes and other Hereditaments and real Estates situate or being within any of the said (British) Plantations (in America) shall be liable" to be sold under execution. Note that the Negroes are "Hereditaments and Real estate," as were the villeins—a rule wholly different from that of the French law.

fications and adjoining territory immediately after the fall of Quebec and in 1763 the first Captain General and Governor in Chief of the new Province of Quebec,¹³ writing from Quebec, November 2, 1763, to John Watts in New York speaks thus of the promoting of agriculture in the Province:

"I must most earnestly entreat your assistance, without servants nothing can be done, had I the inclination to employ soldiers which is not the case, they would disappoint me, and Canadians will work for nobody but themselves. Black Slaves are certainly the only people to be depended upon, but it is necessary, I imagine they should be born in one or other of our Northern Colonies, the Winters here will not agree with a Native of the torrid zone, pray therefore if possible procure for me two Stout Young Fellows, who have been accustomed to Country Business, and as I shall wish to see them happy, I am of opinion there is little felicity without a Communication with the Ladys, you may buy for each a clean young wife, who can wash and do the female offices about a farm. I shall begrudge no price, so hope we may, by your goodness succeed."¹⁴

From time to time slavery makes its appearance in official correspondence. Moreover, there are still subsisting records which show the prevalence of slavery in the province.¹⁵ In January, 1763, there took place at Longueuil the marriage of Marie, slave of baroness de Longueuil, with Jacques César, slave of M. Ignace Gamelin. From 1763 to 1769 there are found records of the baptism of the

¹³ His Commission is dated November 28, 1763, Shortt & Doughty, *Constitutional Documents*, 1759-1761, pp. 126, sqq.

¹⁴ *Canadian Archives, Murray Papers*, Vol. II, p. 15: the Quebec Act mentioned immediately below is (1774) 14 George III, c. 83.

In 1774 the well known Quebec Act reintroduced the former French Canadian law in civil matters while it retained the English law in criminal matters; but the change made no difference in the condition of the slave.

¹⁵ The three which follow I owe to the interesting paper of Mr. E. Z. Massicotte, Archivist of Montreal, published in *Le Bulletin des Recherches Historiques* for November, 1918, pp. 348 sqq.—the advertisement in the Gazette is to be found in Terrill's *Chronicles of Montreal*. The paper was 2½ Spanish dollars per annum, 10 sous per copy, published every Wednesday.

children of slaves in the registers of the Parish of Lachine. In the first issue of the *Gazette* of Montreal, June 3, 1778, there is an advertisement by the widow Dufy Desaulniers, offering a reward of six dollars for the return to her of a female slave who had run away on the 14th. She was thirty-five years old and she was dressed in striped calico of the ordinary cut and was of "tolerable stoutness."

Alexander Henry writing from Montreal, October 5, 1778, to the Governor Sir Frederick Haldimand, says that he had obtained a Judgment in the Court of Common Pleas against one Gillelande in the colonies who owed him a considerable sum of money. "Hearing that a Negro of his had deserted from him," said Henry, "and was lurking in this Province I obtained an execution upon that judgment and got the negro apprehended—who is still in gaol." General Powell who was the Commander there sent to Mr. Gray the Sheriff desiring him to postpone the sale until such time as the Governor should be made acquainted with the matter. Mr. Gray thereafter informed Mr. Henry that he mentioned the affair to Sir Frederick Haldimand, who likewise ordered the sheriff to postpone the sale until the Governor could confer with the Attorney-General. The Attorney-General thereafter informed Mr. Henry that he had spoken to the Governor, who was of the opinion that the civil law should take its course. . . . Mr. Gray thought he should have some definite authority to sell. . . . He said: "There are some gentlemen from the Upper Countries¹⁵ whom I presume will give more for him than any person resident here and . . . they are now on their return." He asked that an order for sale should be sent before the departure of these gentlemen.¹⁵ The higher

¹⁵ The "Upper Countries" were Detroit and Michilimackinac, sometimes including the Niagara region—at this time there were practically no residents in what became the Province of Upper Canada and is now the Province of Ontario. The letter is to be found in the *Canadian Archives*, B. 217, p. 21: as no further record appears, it is to be presumed that an order was made for sale by the Sheriff.

The Report of James Monk, Attorney-General at Quebec, about to be mentioned is to be found in the *Canadian Archives*, B. 207, p. 105.

price which the gentlemen from the "Upper Countries" would pay indicates the objection of those in the old settled parts of the province to slavery.

An official report made in 1778 by James Monk, Attorney General at Quebec, to the Governor, Sir Guy Carleton, (afterwards Lord Dorchester) gives a sufficiently full account of an occurrence the subject of much controversy and correspondence showing the significance of slavery at that time. The Attorney General examined the several papers, making a case of complaint, by Joseph Despin of St. Francois, Merchant, a trader, against Major de Barner Commanding a Regiment of Light Infantry Chasseurs of Brunswick Troops. Despin complained to Brigadier General Ehrenkrook, Commander of the Brunswick Troops at Trois Rivières, that Major de Barner by his orders or otherwise at Midnight of the first of the previous June, occasioned forcibly to be taken from said Despin a Negrowoman slave, Despin's property and suffered her to be carried out of the province. He therefore prayed Brigadier General Ehrenkrook, that Major de Barner might either return to him the said slave with damages or pay to Despin the value thereof.

Upon this complaint an inquiry was made. In the course of this inquiry Joseph Despin did not support his complaint and charge with those legal proofs which could entitle him to recover from Major de Barner thereupon; "or induce a Court of Justice to consider Major de Barner as having either given any others for the taking of, or even had any knowledge touching the intended escape of the Slave." The complaint of Despin was then deemed very justly dismissed.

Upon the dismissal of this complaint Major de Barner requested of the Governor satisfaction and punishment upon the accuser, and a notary, one Robin, who prepared notarial acts, in an unbecoming affrontive manner. This request was made under three heads: first, that Despin might be exemplarily punished, not merely for a false dis-

honoring accusation of Major de Barner, a commanding officer and injurious to his whole battalion, but punishment for the personal insults to Major de Barner and his character; second, that Despin might pay the expenses of preparing and making out writings; and third, that the said Robin, the notary, may be equally punished for using expressions in his acts hurtful and indecent to persons of honor and character.

The Attorney General asserted that there is reason to conclude from the several testimonies appearing in the case, that Despin had lost his slave by means of some soldiers belonging to the Battalion of Chasseurs which Major de Barner Commanded, *though not in the least by the orders or with the knowledge or consent of Major de Barner as charged.*

One of the most extraordinary stories of the time is told by William Dummer Powell, afterwards Chief Justice of Upper Canada, but in 1780¹⁷ and later practising as a barrister in Montreal. "Meeting in the Street of Montreal an armed Party escorting to the Provost Guard several female prisoners and Children," says Mr. Powell, "curiosity was excited and upon engaging the Non-Commissioned Officer commanding the Escort, Mr. Powell was informed that they were Prisoners of war, taken in the Kentucky Country and brought into Detroit by a Detachment of the Garrison and now arrived from thence. Further Enquiry after procuring necessary relief to the first wants of the party, drew from Mrs. Agnes La Force the following Narrative:

"That her husband was a loyal Subject in the Province of North Carolina,¹⁸ having a good Plantation well stocked and a numerous family. That his political Sentiments ex-

¹⁷ In 1778 a much wronged Negro petitioned Haldimand. His petition dated at Quebec, October 17, 1778, reads: "To His Excellency Frederick

Haldimand, Governor & Commander in Chief of all Kanady and the territories thereunto belonging,

The Petition of Joseph King humbly sheweth that Your Petitioner has been twice taken by the Yankys and sold by them each time at Public Vendue: he has made his escape and brought two white men through the woods: he was

posed him to so much Annoyance from the governing Party, that he determined to retire into the wilderness, that he accordingly mustered his whole family, consisting of several Sons and their Wives and Children, and Sons-in-law with their Wives and Children, a numerous band of select and valuable Slaves Male and female, and a large Stock of Cattle, with which they proceeded westward, intending to retire into Kentucky.

"That after" the accidental death of the father they pursued their route to the westward and settled with their Slaves in the wilderness about five hundred miles from any civil establishment. After a residence of three years, a party of regular Troops and Indians from the British Garrison at Detroit appeared in the plain and summoned them to surrender. "Relying upon british faith," says Mr. Powell, "they open'd their Gate on condition of Protection to their Persons and property from the Indians; but they had no sooner surrendered and received that promise than her sons and sons-in-law had to resort to arms to resist the Insults of the Indians to their wives and Slaves."¹⁸ Several lives were lost and the whole surviving Party was marched into Detroit, about six hundred Miles, where the Slaves were distributed among the Captors and the rest marched or boated eight hundred miles further to Montreal and driven into the Provot Prison as Cattle into a Pound."¹⁹

This story will be credited with difficulty but accident some time after put into the hands of Mr. Powell a document of undeniable credit, which, however, was unnecessary: for on Mr. Powell's representation of the case to Sir

a servant to Captain McCoy last winter in Montreal and came here (Quebec) last spring. Your Petitioner has gone through many Perils and Dangers of his life for making his escape from the Yankeys. He hoaps that Your Excellency through the abundance of Your Benevolence will grant him his liberty for which your poor Petitioner as in Duty bound will ever pray." *Canadian Archives*, B. 217, p. 324.

¹⁸ In the Petition referred to *post*, Mrs. La Force states that her husband was "late of Virginia."

¹⁹ I have followed the Powell MSS. in spelling, capitalization, etc.

F. Haldimand the most peremptory order was sent to the Commandant at Detroit to find out the slaves of Mrs. La Force in whose ever possession they might be and to transmit them to their mistress at Montreal. But Detroit was too far distant from headquarters and interests prompting to disobedience of such an order too prevalent for it to produce any effect; and the commandant acknowledged in answer to a reiterated order that the slaves could not be produced, although their names and those of their new masters were correctly ascertained and the following list transmitted with the order.

List of slaves²⁰ formerly the property of Mrs. Agnes La Force and in possession of others:

| | | | |
|-------|--|------------------|---------------------------|
| Negro | Scipio | in possession of | Simon Girty ²¹ |
| do | Tim | " " | " Mr. Le Duc. |
| do | Ishener | " " | " do do |
| do | Stephen | " " | " Captn. Graham. |
| do | Joseph | " " | " Captn. Elliot. |
| do | Peggy | " " | " do do |
| do | Job | " " | " Mr. Baby |
| do | Hannah | " " | " Mr. Fisher. |
| do | Candis | " " | " Capt. McKee. |
| do | Bess, Grace Rachel, and Patrick—Indians. | | |
| <hr/> | | | |
| 13 | | | |

The case of Mrs. La Force and some similar cases led Haldimand to require Sir John Johnson, the Superin-

²⁰ They were taken in an expedition nominally under Captain Bird but he had little control over the Indians and had only a few men of his own, British Regulars. He had had bitter experience of the cruelty and unreliability of the Indians in 1779 but had to go with them in 1780. This was not one of the two large Forts which Bird took in his 1780 expedition, Fort Liberty and Martin's Station, but a smaller fortification. It was taken June 26, 1780 (*Can. Arch.*, B. 172, 480); that there were several small forts is certain; that some of the prisoners brought to Detroit were from the small forts and that they (or some of them) were not rebels appears from the letter from De Peyster of August 4, 1780 (*Canadian Archives*, B. 100, p. 441): "In a former letter to the Commander in Chief," said he, "I observed that it would be dangerous having so many Prisoners here but I then thought those small Forts were occupied by a different set of people."

tendent of Indian Affairs, to report. He wrote from Quebec, July 16, 1781, "Several complaints having been made upon the subject of selling negroes brought into this Province (Quebec) by scouting parties—who allege a Right to Freedom and others belonging to Loyalists who are obliged to relinquish their properties or reclaim them by paying the money for which they were sold, I must desire that you upon the most minute enquiry give in to Brigadier General Maclean a Return of all Negroes who have been brought into the Province by Parties in any Respect under your Directions whether Troops or Indians, specifying their names, their former masters, whether Loyalists or Rebels, by whom brought in and to whom sold, at what price and where they are at present. I shall direct Cols. Campbell and Claus to do the same by which it will be in my Power to reduce the Grievances now complained of and to make such arrangements as will prevent them in future."

Johnson sent a return of Negroes to Maclean and Maclean, July 26, 1781, sent it on to Haldimand: Claus and Campbell made returns direct to Haldimand in August of the same year. Fortunately the covering letters are extant as are the reports. There is also one Negro, Abraham, reported in a Return of Rebel Prisoners in and about Montreal as having been taken June 18, 1781; and, therefore, about a year after Mrs. La Force's capture.^{21a}

"Of the fifty or more slaves named in this list," says Dr. T. W. Smith, "nearly half were sold at Montreal, a few being carried by the Indians and Whites to Niagara. The others were handed to their former owners. 'Charles taken at Balls Town making his escape out of a window in Col. Gordon's house' was sold to the Rev. David C. DeLisle,

²¹ The well-known so-called Renegade, is in reality a loyal subject whose reputation pays the penalty of a losing cause. The others are all well-known loyalists of Detroit.

^{21a} Mrs. La Force's Petition to Haldimand is still extant. *Canadian Archives*, B. 217, p. 116. Her name is included in the list of women and children remaining at Montreal, the list being dated Quebec, September 11, 1782, and she being given as of Virginia and taken June 26, 1780.

the Episcopal rector at Montreal, for £20 Halifax currency; Samuel Judah, Montreal, paid £24 for 'Jacob' also a slave of Col. Gordon, a rebel master, but for a Negro girl of the same owner he gave £60; Nero, another of Col. Gordon's slaves, captured by a Mohawk Indian, Patrick Langan sold to John Mittleberger of Montreal for £60; 'Tom' was sold by Captain Thompson of Col. Butler's Rangers for £25 to Sir John Johnson who gave him to Mr. Langan; and William Bowen, a Loyalist owner, sold his recovered slave 'Jack' for £70 to Captain John McDonell of the Rangers. 'William,' who was also sold for £30 to Mr. McDonell and afterwards carried to Quebec, had been taken from his master's house by Mohawk Indians under Captain John the Mohawk with a wagon and horses which he had got ready to convey his mistress Mrs. Fonda wife of Major Fonda to Schenectady . . . another Negro man, name unknown, was sold 'by a soldier of the 8th Regiment to Lieutenant Herkimer of the Corps of Rangers, who disposed of him to Ensign Sutherland of the Royal Regiment of New York.' "

Negroes were not the only victims of Indian raids. In 1782 Powell had another experience, which is indicative of the practices of the Indians during the Revolutionary War.²² In his letter to the Commissary of Prisoners at Quebec he wrote:

Montreal, 22 August, 1782.,

"Sir

I should make an Apology for the Liberty I take but that I consider it a public Duty.

When you were here some time since. I am informed that mention was made to you of a young female slave bought of the Indians by a Mr. Campbell, a Publican of this Town, and that when

²² The correspondence, &c., is in the *Canadian Archives*, B. 129, p. 221, 225; B. 159, p. 152; B. 183, p. 284. A Negro taken "horse hunting" by a party of Puttewatamies in the West is mentioned August 16, 1782, in B. 123, p. 290. He belonged to Epharaim Hart from whom he deserted and was taken about 20 miles up Cross Creek. I copy from a Manuscript of Powell's in my possession which I have compared with a photostat copy of a manuscript in the *Canadian Archives*.

you learned that she was the Daughter of decent family in Pennsylvania²³ captured by the Indians at 10 years of age, your Humanity opposed itself to the barbarous Claim of her Master and you Promised that she should be returned to her Parents by the first Flag with Prisoners.

"In consequence of such a Promise," continued he, "the Child had been taught to expect a speedy release from her Bondage, and, finding that her Name was in the List permitted by his Excellency to cross the Lines with a flag from St. Johns,²⁴ she imagined that there could be no Obstacle to her Return; but, being informed that Mr. Campbell had threatened to give her back to the Indians, she eloped last Evening, and took refuge in my House from whence a female Prisoner, (sometime a nurse to my children) was to sett off this Morning for the Neighborhood of the Child's Parents. Upon Application from Mr. Campbell to Brigadr. Genl. De Speht setting forth that He had furnished her with money, an order was obtained for the delivery of the Child to her Master and there was no time for any other Accommodation than an undertaking on my part to reimburse Mr. Campbell the Price he paid for her to the Indians. This I am to do on his producing a Certificate from some Military Gentleman, whom he says was present at the Sale. I have no objection to an Act of Charity of this Nature, but *all Political Considerations aside*, I am of opinion that the national Honor is interested that this Redemption should not be the Act of an Individual. As Commissary of Prisoners I have stated the Case to you, Sir, that you may determine upon the propriety of reimbursing me, or not, the sum I may be obliged to pay on this occasion.

"That all may be fairly stated I should observe that the Child was never returned a Prisoner,²⁵ nor has drawn Provisions as such—although there can be no doubt of her political character, having been captured by our Savages."

²³ The western part of Pennsylvania is meant. This region was seething with conflicts on a small scale between the Loyalists and the Republicans. The Indians for the most part took the side of the former.

²⁴ In what is now the Province of Quebec.

²⁵ In 1780 Germain instructed Haldimand that "all prisoners from revolted Provinces are committed as guilty of high treason not as prisoners of war" (*Canadian Archives*, B. 59, p. 54) but a change soon took place and after some intermediate stages, Shelburne, the Home Secretary, in April, 1782, instructed Haldimand that all American prisoners were to be held for exchange. *Canadian Archives*, B. 50, p. 164.

The reply to this communication was:

"I am favored with your's by Saturday's post and have since layed it before His Excellency the Commander in Chief, and I have the Pleasure to inform you that he approves much of your Conduct and feels himself obliged for your very humane Interposition to rescue the poor unfortunate Sarah Cole from the Clutches of the miscreant Campbell; and I am further to inform you that your letter has been transmitted by his Secretary to the Judges at Montreal, not only to make Campbell forfeit the money he says he paid for the Girl, but if possible to punish and make him an example to prevent such inhuman conduct for the Future; but in any Event you shall be indemnified for the very generous Engagement you entered into."

It has been established that Mr. Powell had redeemed his word the day it was given and paid Mr. Campbell Twelve Guineas²⁶ on production of a string of Wampum delivered by the Indians with the girl and the money paid by Campbell. A cartel went forward August 22, 1782, and in the list of prisoners sent south appears the name "Sarah Coal."²⁷ Haldimand gave Mr. Justice Mabane, the man of all work of his administration, instructions to see to it that Campbell did not profit by his inhumanity and also to take such steps that the practice should not prevail for the future.

A petition presented to Haldimand in 1783, however,

²⁶ By the Ordinance of March 29, 1777, 17 George III. c. 6, the guinea was declared equivalent to £1.84, Quebec Currency; this would make the price of the girl, \$42.60. See note 80 post. It is to be presumed that Powell was repaid. He nowhere complains that he was not as he certainly would have done if he had cause to do so.

Negroes were frequently arriving in the colony and seeking aid and subsistence. For example, we find Thomas Scott, J. P., reporting Thursday, May 17, 1781: "The Bearer John Jacob a Negro man just arrived from Montreal has applied to me for relief in his case as set forth in the Annexed Paper. But as I apprehend that can only be given him by His Excellency the Governor I respectfully recommend him to His Excellency's notice." *Canadian Archives*, B. 100, p. 72.

²⁷ See *Canadian Archives*, B. 130, pp. 33, 34.

discloses another transaction with the Indians.²⁸ Jacob Adams presented the petition December 13 of that year from Carleton Island. He said:

"I have taken a Yankee Boy (by name Francis Cole)²⁹ with a party of Messesagee Indians—afterwards when I arrived at Carleton Island with the said party of Indians and said Yankee Boy, the Commanding Officer (Captain Aubrey) demanded the Prisoners Vizt. this Boy and an old man³⁰ the Indians refus'd giving them up on which Capt. Aubrey gave me Liberty to purchase them and so I did by paying sixteen Gallons Rum for the Boy which cost me at this place twenty shillings, York Currency, pr. Gallon,³¹ and he the said Yankee Boy was to serve me the term of four years (with his own lawfull consent) for my redeeming him. As for the old man I likewise bought him for two Gallons Rum but Capt. Aubrey requested I should send him Prisoner to Your Excellency. I acted accordingly. I likewise gave a shirt apiece to each of the two Chiefs who belonged to said party in like manner I lost twenty-four shillings York Currency by four Keggs which the above Rum was put into.³²

"Now, may it please Yr Excellency this said Yankee Boy remained very peaceably and quietly with me for the space of two

²⁸ It is more than doubtful that the prohibition of the sale of white captives by the Indians would be productive of good. The natural result would rather be that the Indians would kill their white captives at once or torture them to death. At the best the prisoners would in most cases, if adults become slaves and if young be adopted into the tribe. There are numerous instances of white captives being slain because unsaleable while the Negroes escaped death because they found a ready market. See the story of Thomas Ridout, post, note 37. The order of Haldimand will be found in the Canadian Archives.

²⁹ Remembering that Sarah Cole was bought by Campbell from the Indians at Carleton Island (near Kingston) it seems likely that Francis Cole was her brother or some other relation. That Adams says nothing of Sarah is not at all strange.

The Mississagua Indians occupied a great part of the territory now the Province of Ontario and were always loyal to the British Crown.

³⁰ In the "Return of Prisoners who have requested leave to remain in the Province made at Quebec, November 3, 1782," appear the names of "Mich. & Phoebe Roach to remain at Montreal to receive a child with the Savages and a man at Carleton Island." These were white. The Report of the Negroes follows. *Canadian Archives*, B. 163, p. 258.

³¹ The York Shilling (or shilling in New York currency) was 12½ cents, one eighth of a dollar.

³² \$5.00 for the rum; \$3.00 for the "Keggs."

months during which Time I took him several Journeys to Fort Stanwix and Oswego and whilst I was absent he got acquainted with some of the soldiers on this Island who persuaded him to get off from me and accordingly he got off in the manner following: when Lieut. Peppin of the 5th Regiment and his Party were embarking on board the Haldimand to go to Niagara, he privately got on board and remained there Incog. for one Day and a Night on which I made an application to Mr. Peppin to make a search for him and accordingly he did and found him and likewise brought him before the Commanding Officer who asked the Boy his Reasons for Running away from me: he replied He did not chuse to live with me on which Capt. Aubrey has sent him down as Prisoner to Yr. Excellency.

"May it please Your Excellency I expect your Excellency will please to take my Case into consideration by granting me the Request of being paid for what I have lost by said Prisoner or the Yankee Boy, to be returned to me. . . ." ³³

There were not wanting at this time or later instances of those convicted of crime buying their lives by enlistment for life. One case of a mulatto, a slave, may be here mentioned. A mulatto called Middleton was convicted at

³³ *Canadian Archives*, B. 216, pp. 14, sqq.

No proceedings seem to have been taken on this Petition and it is probable that Mr. Adams had to stand the loss on Francis Cole the said Yankee Boy as Campbell did on Sarah Cole of Pennsylvania.

Indians were not the only slavers. As soon as the Declaration of Independence was promulgated, if not before, Boston began to fit out privateers to prey on British trade. We read of four privateers reported by Governor Montague as seen in the Straits of Belle Island in 1776, two off Placentia in 1777 and in 1778 committing daily depredations on the coast of Newfoundland. They harried the unprotected fishermen and the farmers of Newfoundland and Labrador but some at least of them went further. Those who had demanded political freedom themselves denied even personal freedom to others. They seized and carried away into slavery some of the unoffending natives, the Eskimos, who were freemen and whose only crime was their helplessness. One instance will suffice. The *Minerva* privateer of Boston, Captain John Grimes, Master, mounting 20 nine pounders and manned with 160 men landed on Sandwich Bay, Labrador, at Captain George Cartwright's station, took his brig, *The Countess of Effingham*, loaded her with his fish and provisions and sent her off to Boston. Cartwright not unnaturally said: "May the Devil go with them." "The *Minerva* also took away four Eskimo to be made slaves of." W. G. Gosling, *Labrador*, Toronto, n. d., pp. 192, 244, 245, 333.

Montreal in 1781 of a felony (probably larceny) which carried the sentence of death. He was an expert mechanic of a class of men much in demand in the army and he was given a pardon conditioned upon his enlisting for life. He chose the Second Battalion of Sir John Johnson's Royal American Regiment then in Quebec and was handed over by Sheriff Gray to the officers of that corps after having taken the oath of allegiance administered to all recruits.³⁴

Many slaves were employed as boatmen, laborers, and the like, in the army. We find a letter from headquarters at Quebec to Captain Maurer who was at Montreal, dated October 6, 1783, which reads:

"Having had the Honor to communicate to His Excellency, the Commander-in-Chief, your intimation that applications have been made by the Proprietors of some Negro's Serving Capt. Harkimer's (Herkimer) Company of Batteau Men to have them restored to them and desiring to receive His Excellency's Pleasure therein, I am directed to signify to you His Excellency's Commands that all such Negro's to be given up on the Requisition of their owners, provided they produce sufficient Proofs of their Property and give full acknowledgments or Receipts for them which must be taken in the most ample manner to prevent future claims and to have the necessary recourse to those Persons who receive them should different applications be made for the above Negro's."³⁵

Peace had come³⁶ and there was no more need for a large army. But it was some years before the Indians of the western country ceased from their practice of making prisoners.³⁷

³⁴ See *Canadian Archives*, B. 61, p. 83, where he is called a Negro. *Ibid.*, B. 158, p. 261, where he is called a mulatto.

³⁵ *Canadian Archives*, B. 215, p. 236.

³⁶ The Definitive Treaty of Peace between the mother country and her revolted colonies, now become the United States of America, was signed at Paris, September 3, 1783, but it had been incubating for months before that date.

³⁷ It may not be out of place to give some account of the capture by Indians of Thomas Ridout, afterwards Surveyor General and Legislative Councillor of Upper Canada. His story is given in his own words by his granddaughter, Lady Edgar, in her interesting *Ten Years of Upper Canada*.

Thomas Ridout, born in Dorsetshire, when twenty years of age came to Georgia in 1774. After trading for a few years he left Annapolis, Maryland, in 1787 for Kentucky with letters of introduction from George Washington, Colonel Lee of Virginia and other gentlemen of standing. Sailing with Mr. Purviance, his man James Black and two other men towards the Falls of the Ohio, the party was taken by a band of about twenty Indians. Ridout was claimed by an elderly man, apparently a chief, who protected him from injury, but could not save his hat, coat and waistcoat. Soon he saw tied two other young men who had been taken that morning and set aside for death. Ridout was able to secure their release. The Indians were Shawanese, Pottawatamies, Ottawas and Cherokees. One prisoner, William Richardson Watson, said to be an Englishman but who had lived for some years in the United States, they robbed of 700 guineas and then burnt to death. Purviance, they beat to death but Ridout was saved by the Indian who claimed him as his own. A white man, Nash, about twenty-two who had been taken by the Indians when a child and had become a chief, encouraged him and told him that he would be taken to Detroit where he could ransom himself. He was more than once within a hairsbreadth of death but at length he was brought by his master, Kakinathucca, to his home. He was a great hunter and went every year to Detroit with his furs for sale, taking with him his wife Metsigemawa and a Negro slave. The chief had a daughter Altowesa, about eighteen years of age "of a very agreeable form and manners." She saved Ridout from death from the uplifted hand of an Indian who had his hand over him ready to strike the fatal blow with his tomahawk.

At the end of three weeks the whole village set off for the Wabash. Arriving at the Wabash his papers were read by the interpreter, a white man who had been taken prisoner several years before and held in captivity. The Indians were assured that Ridout was an Englishman and not an American and they consented that he might go with his master to Detroit for ransom. The Indians were excessively enraged at the Americans who they claimed were the cause of their misfortunes. The preceding autumn the Americans had come to their village on the Seito River from Kentucky and in times of profound peace and by surprise destroyed their village and many of their people, their cattle, grain and everything they could lay their hands on.

Ridout witnessed the torture and heard the dying shrieks of an American prisoner Mitchell who had been captured with his father Captain Mitchell on the Ohio. The father had been liberated but the son given to a warrior who was determined to burn him.

After three or four days, Ridout's master collected his horses and peltry and with his wife, the Negro and Ridout set out for Detroit. On the way there were met other Indians among whom was the noted Simon Girty. A council was held at which the murderer of Mitchell claimed Ridout as his, but at length Kakinathucca prevailed and Ridout's life was again spared. The murderer asserted that he was a spy but his papers proved his innocence. The little party went on to Fort Miami where several English and French gentlemen received Ridout with open arms. Mr. Sharpe clothed him and a French gentlemen lent a canoe to carry the party and furs 250 miles by water to Detroit. Reaching Detroit, which, it should be remembered, remained in

British hands until August 1796, he was received with every attention and a bed was provided for him at Government House. The officers furnished him with money and gave him a passage to Montreal where he arrived about the middle of July, 1788. Ridout settled in Upper Canada. In 1799, Kakinathucca and three other Shawanese chiefs came to pay him a visit at York, (Toronto), and were hospitably treated, the great and good Kakinathucca receiving substantial testimony of the gratitude of the man he had saved from a death of torture.

Ridout's memorandum of the fate of the other prisoners is terribly significant: "Samuel Purviance, Killed; Barland, Killed; Wm. R. Watson, burnt; James Black, beat to death; Symonds, burnt; Ferguson, sold for corn; a negro woman unharmed."

RETURN OF NEGROES AND NEGRO WOMEN BROUGHT INTO THE PROVINCE BY PARTIES UNDER THE COMMAND AND DIRECTION OF LIEUT. COL. SIR JOHN JOHNSON, BART, 1783.

| Names | Former Masters | Property of Loyalists | Rebel Property | By Whom Brought In | To Whom Sold | Price Sold For | Where They Are at Present |
|----------------------------|----------------|-----------------------|----------------|--------------------|---------------------|----------------|---------------------------------------|
| Tom | Conyne | Loyalist | Rebel | Canada Indians | Jacob Jordon | Halifax Curry. | Montreal with Mr. Jordon. |
| Charles ¹ | Smyth | ditto | ditto | Mohawk Indians | Rev. Mr. DeLisle | £ 12-10 | Montreal with Mr. DeLisle. |
| Jacob ² | Col. Gordon | ditto | ditto | Mohawk Indians | John Mittleberger | 20— | Montreal in Provost Genl. |
| A Negro Wench ³ | ditto | ditto | ditto | Mohawk Indians | Saml. Judah | 60— | Quebec. |
| Betty | Capt. Collins | ditto | ditto | Mohawk Indians | ditto | 24— | Montreal with Mr. Judah. |
| Tom ⁴ | Col. Fisher | ditto | ditto | Mohawk Indians | John Gregory | 60— | Montreal with Mr. Gregory. |
| Jack | Barney Wimple | ditto | ditto | ditto | Capt'n. Thomson | 45— | Montreal with Mr. Taugen. |
| Diana | Adam Fonda | ditto | ditto | Royal R't., N. Y. | ditto | 25— | Montreal with Capt. Anderson. |
| William ⁵ | Major Fonda | ditto | ditto | ditto | ditto | ditto | ditto |
| Catharine | J. Wimple | ditto | ditto | Mohawk Indians | Mr. McDonell | 30— | Quebec. |
| Simon ⁶ | Dora Fonda | ditto | ditto | ditto | Capt. Sherwood | 12-10 | St. James with Capt. Sherwood. |
| Boatswain | Lewis Clement | ditto | ditto | Canada Indians | John Grant | 12-10 | St. Genevieve with Capt. A. McDonell. |
| Jane | ditto | ditto | ditto | ditto | ditto | ditto | Niagara with A. Wimple. |
| Dick | Col. Butler | ditto | ditto | Mohawk Rangers | ditto | ditto | Niagara with his former master. |
| Jack ⁷ | Wm. Bowen | ditto | ditto | Royal R't., N. Y. | Capt'n. J. McDonell | 70— | ditto |
| Peggy | Mr. Young | ditto | ditto | ditto | ditto | ditto | ditto with his former master. |
| Mink ⁸ | Capt. Harkemaw | ditto | ditto | ditto | ditto | ditto | ditto with her former master. |
| | | | | | | | Coteau du Lac with his former master. |

¹ Taken at Bulls Town, making his escape out of a window in Col. Gordon's House.

² Runed away some time ago from his late Master.

³ Taken at the same place endeavoring to make his escape, also runed away from his late Master.

⁴ Sold by Sir John Johnson in lieu of a Negro wench and child of his Property which Col. Gordon exchanged for this Wench.

⁵ Sold by Capt. Thomson of Col. Butlers Rangers, to Sir Johnson who gave him to W Langen Since Dead.

⁶ Taken at his masters house by Capt John the Mohawk, with Waggon & Horses which he got ready to convey his mistress to Schenectady.

⁷ Sold by John Grant to Capt'n Alexander McDonell.

⁸ Sold by Wm. Bowen his Former Master, to Capt'n John McDonell of Col. Butlers Rangers.

⁹ Came in with Sir John Johnson, and are now employed in Capt'n Harkimers company of Batteau Men.

| Names | Former Masters | Property of Loyalists | Rebel Property | By Whom Brought in | To Whom Sold | Price Sold For | Where They Are at Present |
|--|----------------|-----------------------|----------------|--------------------|--------------|----------------|---------------------------|
| Tance | Adam Fonda | | Rebel | | | | Coteau du Lac. |
| Cato | Prayne | | ditto | | | | ditto |
| Jack | Major Fonda | | ditto | | | | ditto |
| William | ditto | | ditto | | | | ditto |
| Frank | Sir J. Johnson | Loyalist | | Rt. Rt., N. Y. | | | With his Master. |
| Ferry | ditto | ditto | | ditto | | | ditto |
| Jack | ditto | ditto | | ditto | | | ditto |
| Abraham | ditto | ditto | | ditto | | | ditto |
| Tom ¹⁰ | ditto | ditto | | ditto | | | ditto |
| Sam | ditto | ditto | | ditto | | | ditto |
| Jacob a boy | ditto | ditto | | ditto | | | ditto |
| Tance a boy | ditto | ditto | | ditto | | | With her master. |
| Phillis | ditto | ditto | | ditto | | | ditto |
| Betty | ditto | ditto | | ditto | | | ditto |
| Jade | ditto | ditto | | ditto | | | ditto |
| Jano | ditto | ditto | | ditto | | | ditto |
| Hager | ditto | ditto | | ditto | | | ditto |
| Nicholas | Col. Claus | ditto | | Mohawk Rangers | | | With his master. |
| Tom | ditto | ditto | | ditto | | | ditto |
| Peter | ditto | ditto | | ditto | | | ditto |
| Maria | ditto | ditto | | ditto | | | ditto |
| A Negro man name unknown ¹¹ | | | | | | | |
| N. B. several others carried to Niagara by Indians and White Men ¹² | | | | | | | |
| Chas. Grandison Col. Warner | | | | | | | |

¹⁰ Since dead.—All these marks for Sir John Johnson Joyned him on the Mohawk.

¹¹ Sold by a Soldier of the 8th Regt to Lieut Harkener of the Corps of Rangers, who sold him to Ensign Sutherland of the Rt Rt N. Y.

¹² Sent a Prisoner to Fort Chambly.—The Indians still claim the allowance promised them by ye Commandr in Chief.

JOHN JOHNSON,
Lieut Col Comm.

CHAPTER III

AFTER THE PEACE

Early in the summer of 1782, Haldimand received orders from Sir Guy Carleton then in New York to act only on the defensive. This was due to the negotiations for peace being on the way, and from that time it may fairly be said that Canada was at peace.

One slave felt the movement in the air. This was Plato, an old Negro slave who had been taken in Carleton's operations against Fort George in 1780 and brought to Montreal where he entered the service of St. Luc, a personage in those days. Plato had belonged to a Mr. Stringer who, the slave always asserted, never joined the rebels. But when, on November 3, 1782, there was made by the Commissary of Prisoners at Quebec a return of the prisoners who had requested to remain in the province, Plato's name appeared in the list. The next year he changed his mind and on July, 17, 1783, he presented a petition to Haldimand asking him to "excuse these few lines from a slave who would wish to go again to his own Master and Mistress." He added: "The Gentleman I am now living with Mr. St. Luc says he is very willing to let me go with the first party that sets out from here" (Montreal).¹ Another Negro slave Roger Vaneis (Van Ness) who had also been taken at Fort George declined to go. He was living with Lieutenant Johnson and was to have his freedom on serving for a time already about completed.²

The declaration of peace, however, brought many more slaves into Canada. Even before the treaty was signed some of those who had kept their faith to England's crown and desired to live and die under the old flag made their

¹ *Canadian Archives*, B. 163, p. 258: *ibid.*, B. 163, p. 324.

² *Ibid.*, B. 163, p. 258.

way to the north. After the peace when the cause was lost, many thousands came. Many of these had been slaveholders and they brought their slaves with them. Some settled in what was afterwards Lower Canada in Sorel and elsewhere, some in the upper country, around Cornwall, Kingston, and Niagara, and a very few crossed the river at Detroit.³

Returns made about the time show a large number of slaves—euphemistically disguised as *servants* in some cases. A Report of 1784 shows 14 near Cataraqui (Kingston). Another of the same year for the new townships on the River St. Lawrence beginning at Township No. 1, on Lake St. Francis and running upwards, gives

| | |
|--|----------|
| 1st Battn. late King's R. Rifles | 25 |
| Tps. 1, 2, 3, 4, 5. | |
| Part Major Jessup's Corps | 12 |
| Tps. 6. 7 & pt. 8. | |
| 2nd Battn. | |
| Tps. 3, 4, Cataraqui | 10 |
| Capt. Grass, Party | |
| Tp. 1 Cataraqui (apparently none) | |
| Part Major Jessup's Corps | |
| Tp. 2 Cataraqui | 12 |
| Major Rogers' Corps | 14 |
| Tp. 3 Cataraqui | |
| Major VanAlstine's Party of Loyalists ⁴ | 17 |
| | <hr/> 90 |

In the return of the disbanded troops and Loyalists at Sorel the same year, the number of servants is given at 5; none near Chambly, 3 about St. John's, 40 about Montreal,

³ As Britain kept possession of Detroit until 1796, many United Empire Loyalists settled on the west side of the river at that point. A few remained on the east side of the Niagara River as Fort Niagara was held in the same way.

⁴ *Canadian Archives*, B. 168, p. 42.

Different detachments of disbanded regulars on Tp. 5 Cataraqui, detachment of Germans under Baron Kritzenstein on Tp. 5 Cataraqui and Rangers of 6 Nations Department settled with the Mohawks on Bay of Quinte return no servants. *Canadian Archives*, B. 168, p. 42. Report dated Montreal, July 1, 1784.

and 8 about Lachine.⁵ In the Niagara district in 1782 the blunt word "slave"⁶ is used and the number given at only one. In 1784 the first census in which slaves were counted was made. In the District of Quebec there were 88, in the District of Trois Rivières 4, and in the District of Montreal 212. In what was afterwards the Province of Lower Canada there were in all 304.

The sale and marriage of Negro slaves continued to be recorded. For example, there are extant two notarial acts of sale of a female Negro slave called Peg, June 9, 1783 from Elias Smith to James Finlay and May 14, 1788 from Finlay to Patrick Langan. In each case the price was £50^s. On January 20, 1785 there took place at Christ Church the marriage of Francis and Jane both slaves to Colonel Campbell. On March 9, 1785, there was a sale of a female Negro slave named Sarah, by James Morison, merchant, as agent for Hugh McAdam, of Saratoga, New York, to Charles Lepallieur, Clerk of the Court of Common Pleas. The price was 36 louis. On April 1, 1785 Elizah Cady of New York, sold to William Ward of Vermont, four Negroes: Tobi 24 years, Joseph 20 years, Sarah 19 years and a child six months, the price being 250 louis. On April 26, William Ward sold three of these slaves at Montreal to William Campbell—that is Tobi, Sarah and the child for \$425. On May 6, William Campbell sold these three slaves to Dr. Charles Blake for \$300.

On September 5, there followed the sale of a Pani slave

⁵ *Canadian Archives*, B. 168, pp. 44, 47, 48, 51, 55, 61, 63, 67, 68, 71, 77, September, 1784. See also B. 168, pp. 81, 88, 92, 95, 99, 100, 101, 102. These may be found in the Report for 1891 of the *Canadian Archives* Department, pp. 5-20.

⁶ *Ibid.*, B. 169, p. 1. There is a column for "Male Slaves" and one for "Female Slaves." Thomas McMicken has the proud monopoly, he had one male slave. The other fifteen householders had none. But then he had 20 hogs to look after and no one else had more than 14; most many fewer.

⁷ *Canadian Archives*, B. 225, 2. p. 406. Massicotte B. R. H. *ut supra*.

⁸ LaFontaine *ut supra*, pp. 21, 22.

⁹ Those in the text are taken from M. Massicotte's Article, B.R.H. *ut supra*. The letter of Campbell is *Can. Arch.*, B. 162, p. 351. That of Doty, *ibid.*, p. 365; the Report is *ibid.*, p. 385.

called Charlotte, aged eighteen years, by Dame Marie-Josephe Deguire, widow of Jean-Etienne Waden, to Jacob Schieffelin, auctioneer, for 21 louis. The said slave had been brought from Upper Canada by Mr. Waden in 1776. To increase her value it was said that the slave had had the measles and the small-pox and was not scrofulous nor had any other defect.

On January 22, 1786, there took place at Christ Church the marriage of the slaves, Thomas York and Margaret McCloud. On March 17, 1787, Samuel Mix, Merchant of Saint-Jean on the Richelieu, sold to Louis Gauthier, merchant tanner of the Faubourg Saint Laurent, a female Negro slave named Rose aged 14 years for the sum of 40 louis. On June 6, 1789, Charles Lepallieur resold to James Morison the female Negro slave Sarah whom he had sold to him in 1785. The price was 36 louis. On the sixth of June James Morison sold the same Sarah for 50 louis to Joseph Andrews, at a profit of 14 louis. On April 3, 1790 there was a sale by Oliver Hasting to M. le chevalier Chs. Boucher de la Bruère, de Boucherville, of a Negro of the name of Antoine, aged eight years and a half. The price was 90 minots de blé. On September 9, 1791 followed the sale at auction of the female Negro slave Rose, aged 19 years, by William Matthews, merchant of Sorel, to Lambert Saint-Omer, Merchant of Montreal, for 38 louis and 5 shillings. This slave had already belonged to S. Mix as set forth above.

Alexander Campbell writing from Montreal August 16, 1784, to Major Mathews says that having sent to Albany to recover some of his debts, Adam Fondea of Cauchnawago of Tryon's County gave as an excuse for not paying his debt that a certain Negro woman named Dine born in his own family and his actual property was taken away from his house by Captain Samuel Anderson of Sir John Johnson's First Batallion, and was still detained by him as his property. Fondea being willing to pay the debt had sent a power of attorney to take his slave, sell her and

pay the debt with the proceeds. Campbell asked that the governor should order Dine to be seized and sold as no Magistrate had the power or the inclination to give such an order. No attention seems to have been paid to this request.

On September 15, 1784, James Doty writing also from Montreal says that "with some difficulty to myself I have . . . purchased a Negro boy from Lieut. Clench of the Indian Department which boy has been allowed his provisions drawn at Cataraqui (Kingston) from the time of his first coming into the Province with other Loyalists from N. York last year." He asked to have this allowance continued. There was no answer. The report of settlers near Cataraqui for this year gave 3 "servants" and near Oswegatchie 11. But the importation of Slaves was not encouraged indiscriminately.¹⁰

The accustomed abuses were not wanting. In an action *Poirée v. Lagord* in the Court of Common Pleas at Montreal July 1788, it was proved that Lagord had sold to Poirée in September, 1787, a free Negro for £37.6. He was ordered to repay the price with interest. Another and more celebrated case was that of the Negro Nero. In 1780 Haldimand sent a detachment of troops accompanied by Mohawk Indians to attack Ballstown and the Saratoga region. They captured a number of Negroes some of them the slaves of Colonel Gordon of the American service. These were claimed by the white men and Indians, and as was the custom, they were brought to Montreal and sold. One Negro called Dublin was known to be free. He was liberated and enlisted in the army. Lieutenant Patrick Langan acted as agent for the Indians and sold Nero to John Mittleberger for £60, December 5, 1780. Claiming the Negro as a prisoner of war General Allan Maclean im-

¹⁰ In a letter from Henry Hope, Lieutenant-Governor dated Quebec, November 6, 1786, to Captain Enys, 29th Reg't., we read:

"I am by desire of His Excellency the Commander in Chief (Lord Dorchester) to require that no negro slaves shall be permitted on any account to pass into this Province by the Post under your command."

prisoned him "in the public Provot." He made his escape and went to his master Colonel Gordon and Mittleberger sued Langan in 1788 for the price and for damages. In January 1789 he was awarded judgment for the £60 and interest.¹¹ About the same time Rossiter Hoyle, attorney for the trustees of Mary Jacobs, obtained a judgment in the Court of Common Pleas at Montreal that Donald Fisher and Elizabeth his wife should forthwith deliver "two negro women, the one named Silvia Jane, the other Ruth Jane," which said Negro women, they had sold to Mary Jacobs by a notarial deed for £50 or pay £50 with costs.¹²

There are also in existence advertisements for the sale of Negroes. In the *Quebec Gazette* of March 18, 1784, is the advertisement of the sale of a female Negro slave, price to be obtained on inquiry of Madame Perrault. In the issue of March 25, 1785, there is advertised for sale a Negro of about twenty-five years of age who has had the smallpox. There appear also a few advertisements for runaway slaves.

There arose also some complaints like the following: In 1784 there was presented at Quebec to Sir Frederick Haldimand, Governor in Chief, a petition from John Black showing that the petitioner hath served as a seaman in His Majesty's service on board the sloop, *Happy Couple* of New York for which he had a certificate to shew, and was then living servant to Mrs. Martin, the wife of Captain Martin of this place, who wanted to deprive him of his liberty and humbly begged His Excellency to grant him a passport.¹³

The immigration into Canada of those who had been British subjects was ardently desired by the home authorities. To encourage this immigration, the Imperial Parlia-

¹¹ LaFontaine *ut supra*, pp. 22, 23, 24, 44, 45, 46. *Le Monde Illustré* December 9, 1893. Massicotte, *Bulletin des Recherches Historiques* for November, 1918, pp. 348 sqq.

¹² LaFontaine *ut supra*, p. 43. The advertisements spoken of are on p. 21.

¹³ *Can. Arch.*, B. 217, p. 397. What if anything was done on the petition does not appear.

ment in 1790 passed an Act¹⁴ which had some effect in increasing the slave population. Intended to encourage "new settlers in His Majesty's Colonies and Plantations in America," it applied to all "subjects of the United States." It allowed an importation into any of the Bahama, Bermuda or Somers Islands, the province of Quebec (then including all Canada), Nova Scotia and every other British territory in North America. It allowed the importation by such American subjects of "Negroes, household furniture, utensils of husbandry or cloathing free of duty," the "household furniture, utensils of husbandry and cloathing" not to exceed in value £50 for every white person in the family and £2 for each Negro, any sale of Negro or goods within a year of the importation to be void. After the division of the Old Province of Quebec into Upper and Lower Canada in 1791 the course of slavery was different.¹⁵

It seems appropriate to close this chapter by adding a number of available advertisements including some of runaway apprentices.¹⁶

Il s'est enfui de chez les Soussignés, la nuit du 12 du courant, Un Nègre Eselave nommé POMPÉ d'environ cinq pieds cinq poudes d'hauteur, robuste, il a été acheté dernièrement de M. Perras, négociant de cette ville; il avoit sur lui quand il a décampé un gilet et des culottes brunes: Celui qui le ramenera aura HUIT PIASTRES de Récompense, et les frais raisonnables qu'il aura faits. Quiconque le retirera chez lui sera poursuivi suivant la dernière rigueur de la Loi, par

JOHNSTON & PURSS.

RUN-AWAY from the subscribers, in the Night of the 12th inst. a Sailor Negro Slave named POMPEY, about 5 Feet, 5 Inches

¹⁴ (1790) 30 George III, c. 27.

¹⁵ The division of the Province of Quebec into two provinces, that is, Upper Canada and Lower Canada, was effected by the royal prerogative, Sec. 31, George III, c. 31, the celebrated Constitutional Act of Canada. Technically and in law, the new province was formed by Order in Council, August 24, 1791, but there was no change in administration until December 26, 1791.

¹⁶ These I owe to the kindness of the officers of the Canadian Archives Department of Ottawa.

high, and is Robust; he was lately bought of Mr. Perras, Merchant in this Town; had on when he went away a brown Jacket and Breeches. Whoever brings him to the Subscribers shall have EIGHT DOLLARS Reward and reasonable Charges paid. Any Person Harbouring him will be prosecuted according to the utmost Rigor of the Law, by

JOHNSTON & PURSS.

Run-away from the Subscriber, living in Quebec, on the Evening of the 9th Instant, an indented Servant Woman, named Catharine Osburn, about 20 or 21 years of Age, red fac'd, very fat and rough skin'd, about 5 Feet 5 Inches high, a little mark'd with the Small-Pox; She had on a purple colour'd Stuff Jacket flower'd with green and white, a blue thick Kersey Petticoat, blue Stockings with White clocks, an old red Cloak; and took with her two new Shifts of good Dowlas Linen, seven plain and two lac'd caps. She was inticed away by two discharg'd soldiers, John Linsey and John McDonald, said to be going for New-England. McDonald was formerly Turnkey at the Gaol; they were both of the 60th Regiment. Whoever takes them up, and secures them, so that they may be brought to Justice, shall receive Five Dollars Reward for each of them; and whoever secures the Woman, or brings her to her Master, shall receive Five Dollars Reward, and all reasonable Charges, paid by

WILLIAM LAING.

N. B. All Persons are forbid to harbour or carry any of them off. It is thought that they are still harbour'd in and about this City Quebec, 14th March, 1767.—*Quebec Gazette*, 1767.

Whereas William Russey, an article'd Servant to Mr. Suckling, of this City, hath lately run-away, and absented himself from the Service of his said Master: If any Person will give Information to the said Mr. Suckling of the said Servant, so that he may be apprehended and brought before John Collins, Esq; one of His Majesty's Justices of the Peace for the District of Quebec, shall, upon such Apprehension and Bringing, receive Eight Dollars Reward, to be paid by me the Subscriber: And any Person or Persons who shall, after this Notice, employ, harbour or conceal the said Servant, will be prosecuted with the utmost Severity of the Law, by me,

GEO. SUCKLING.

QUEBEC, 14th April, 1767.

—*Quebec Gazette*, 1767.

Run-away, from James Crofton, Vintner in Montreal, the Third of May, 1767, a Mulatto Negro Slave, named Andrew, born in Maryland Twenty-three Years of Age, middle sized, very active and sprightly, has a remarkable large Mouth, thick lips, his Fingers crooked, speaks good English and French, a little Dutch and Earse; is supposed to have with him forged Certificates of his Freedom, and Passes. Whoever takes up and secures the said Negro, so that his Master may have him again, shall have Eight Dollars Reward, besides all reasonable charges, paid by Mr. Henry Boone, Merchant, at Quebec, or James Crofton, at Montreal.

N. B. He is remarkable for being clean dres'd and wearing a Handkerchief tied round his Head: is very well known to all the Gentlemen at Quebec, that has been in Montreal, and who have used my House, and was Three Months with Mr. Joseph Howard, of Montreal Merchant, last Summer in Quebec.—*Quebec Gazette*, 1767.

TO BE SOLD,

For no Fault, the Owner having no employ for him,

A likely Negro fellow, about 23 or 24 Years of Age; understands Cooking, waiting at Table, and Houshold Work, &c. &c. He speaks both English and French. For further Particulars enquire of the Printers.—*Quebec Gazette*, 1770.

From the Subscriber, on Sunday morning the 24th ult, about four o'Clock, a Negro Lad named NEMO, born in Albany, near eighteen years of age, about five feet high full round fac'd, a little marked with the Smallpox, speaks English and French tolerably; he had on when he went away a double-breasted Jacket of strip'd flannel, old worsted Stockings, and a pair of English Shoes. Also a Negro Wench named CASH, twenty-six years old, about 5 feet 8 inches high, speaks English and French very fluently; she carried with her a considerable quantity of Linen and other valuable Effects not her own; and as she has also taken with her a large bundle of wearing apparel belonging to herself, consisting of a black satin Cloak, Caps, Bonnets, Ruffles, Ribbons, six or seven Petticoats, a pair of old Stays, and many other articles of value which cannot be ascertained, it is likely she may change her dress. All persons are hereby forewarned from harbouring or aiding them to escape, and Masters of vessels from carrying them off, as they may depend on being prosecuted to the utmost rigour of the Law;

and whoever will give information where they are harboured; or bring them back to the Subscriber at Quebec, or to Mr. George Ross, Merchant at Sorel, shall have TEN DOLLARS Reward for each, and all reasonable charges. HUGH RITCHIE.

N. B. The Lad was seen at Sorel on Friday morning the 29th ult. and there is reason to believe they are both lurking thereabout.

QUEBEC, November 2, 1779.

—*Quebec Gazette*, 1779.

Ran-Away on Sunday the 24th of October, JOHN BARCLAY, an Apprentice, aged 15 years, small of his age, has short black and lank Hair, dark hazle Eyes, good complexion a little freckled, speaks good English and a little French: had on when he went away a light grey Coat and Waistcoat, and stript cotton Trowsers with leather Breeches under them. Whoever will apprehend him or give information so that he may be apprehended, shall receive Five Guineas Reward from

SHOOLBRED & BARCLAY.

QUEBEC, November 2, 1779.

—*Quebec Gazette*, 1779.

Run Away from his bail, an indented servant man named Christian Miller, born in Germany, by trade a Tailor, he is about 5 feet 9 or 10 inches in stature, well made, middling long black hair, speaks English tolerably well, he was formerly a servant to a German Hessian officer, one Mr. Seiffort, Lieutenant in Capt. Schoels regiment, has very much the art and behvaiour of a sham beau and has a variety of cloaths, viz. a Maroon Coat, a brown ditto, lined with light blue silk, the one had Gold the other Silver Buttons, a brown Great Coat and a variety of Waistcoats and Breeches: Whoever will apprehend the said Run-away, so as the subscriber may have him in custody shall receive FIVE GUINEAS reward, over and above any reasonable expences; and all masters of vessels, officers of the army and others, are forwarn'd not to harbour or entertain him nor to be aiding in his escape, on pain of being prosecuted as the law directs.

Note. If apprehended at Quebec, apply to Mr. Wm. Laing, Merchant, or to the subscriber at Montreal.

(Signed) JOHN MITTLEBERGER.

MONTREAL, 4th July, 1782.

Quebec Gazette 1782.

Ran Away from the subscriber, on Thursday evening the 21st instant, an Apprentice Boy named JOSEPH POWERS, a Shoemaker, about fifteen years of age, of a fair complexion short hair, speaks English and French, had on when he went away a Blanket Coat, light blue Waistcoat and Breeches very dirty, a Cheek Shirt much wore, a round Hat, and a pair of Slippers: this is to give notice to the public that they are not to harbour the said Apprentice in their houses or families, otherwise they will be prosecuted as the law directs.

ALEXR. WALLACE.

QUEBEC, November 27, 1782.

—*Quebec Gazette*, 1782.

Ran-Away from the Printing-Office, On Monday night last, an Apprentice Lad named Duncan M'Donell, about 19 years of age, about five feet five inches high, of a fresh complexion; speaks English, French and Erse: all persons are hereby forwarn'd from harbouring him, as they may depend on being prosecuted to the utmost rigour of the Law, and whoever will bring him back shall have One Guinea Reward from the

PRINTER.

QUEBEC, April 17, 1783.

—*Quebec Gazette*, 1783.

TO BE SOLD.

A NEGRO WENCH about 18 years of age, who came lately from New York with the Loyalists. She has had the Small Pox—The Wench has a good character and is exposed to sale only from the owner having no use for her at present.

Likewise will be disposed of a handsome Bay Mare.

For particulars enquire of the Printer.

—*Quebec Gazette*, 1783.

A Gentleman going to England has for sale, a Negro-wench, with her child, about 26 years of age, who understands thoroughly every kind of house-work, particularly washing and cookery: And a stout Negro—boy, 13 years old: Also a good horse, cariole and harness. For particulars enquire at Mr. William Roxburgh's Upper-town, Quebec, 10th May, 1785.

—*Quebec Gabette*, 1785.

To be SOLD together.

A Handsome Negro Man and a beautiful Negro Woman married to one another: the man from twenty-three to twenty-four years of age, between five and a half and six English feet high: the woman from twenty-two to twenty-three years of age; both of a good constitution. For further information, such as may be desirous of purchasing them must apply to Mr. Pinguet, in the Lower-town of Quebec, Merchant.

—*Quebec Gazette*, 1788.

CHAPTER IV

LOWER CANADA

The Province of Lower Canada continued the former law—in criminal matters, the English law, in civil matters the French law. It was not long before the status of the slave became a burning issue. At the first session of the first Parliament¹ of the new Province Lower Canada, Mr. P. L. Panet, a member of the House of Assembly, moved (January 28, 1793) for leave to introduce a bill for the abolition of slavery in the province and leave was unanimously given. On the twenty-sixth of February, Panet introduced a bill pursuant to leave given, and it was read in French and in English. On the eighth of March, Mr. B. Panet proposed the first reading of the bill and it was so read. On the nineteenth of April Mr. P. L. Panet moved that the bill be taken into consideration by the Committee of the Whole on the following Tuesday. The motion was debated and Mr. Debonne moved an amendment to table the bill, which was carried 31 to 3.² There was no further effort toward legislative dealing with slavery until 1799.³

The sale of Negroes continued as indicated by the

¹ Under the Canada Act of 1791, the provinces had each a parliament or legislature, an upper house, the Legislative Council, of nominated members, not fewer than seven in Upper and not fewer than fifteen in Lower Canada, and a lower house, the House of Assembly, sometimes called the House of Commons, elected by the people, not fewer than sixteen in Upper and not fewer than fifty in Lower Canada.

² In the sister province a bill to the same effect was more fortunate in the same year a little later. This will be considered in the next chapter.

³ In a work of some authority, Bibaud's *Pantheon Canadien*, page 211, it is said that "Joseph Papineau, Notary Public, Member of the Legislative Assembly for Upper Quebec presented about 1797 a petition of the citizens of Montreal for the abolition of slavery." If that be the case there was nothing done on the petition, but it seems probable that the author refers to the petition of 1799 spoken of later in the Text.

records.⁴ On the twelfth of May, 1794, Francois Boucher de la Périère and Marie Pecaudy de Contrecoeur, his wife, gave liberty to James, their Negro slave, aged 21 years, on condition that he should live in the most remote parts of the upper country. If, however, he left those parts, he should return to slavery. On the fifteenth of December, 1795, Frs. Dumoulin, merchant of Bout de l'Ile sold to Myer Michaels, merchant, a mulatto named Prince, aged 18 years, for the price of 50 louis.

On the sixteenth of January, 1796 there was found a bill of sale of a female Negro slave named Rose, dated January 15, 1794, the vendor being P. Byrne, the purchaser Simon Meloche, for the price of 360 shillings, deposited with the Notary J. P. Delisle. On the third of September John Shuter by notarial act promised his Negro, Jack, to give him his liberty in six years, if, in the meantime, he served him faithfully. Later, on November 2, 1803, Shuter declared that Jack had fulfilled his obligation, and he accordingly emancipated him. On the thirteenth of September, J. B. Routier, merchant of the Faubourg Saint-Antoine, sold to Louis Charles Foucher, Solicitor-General of His Majesty, Jean Louis, a mulatto, aged 27 years, height 5' 10", the price being 1300 shillings. Routier declared that he had bought Jean Louis as well as his mother at the Island of Saint-Domingue in 1778. On the twenty-third of November César, a free Negro of New London, Connecticut, engaged for ten years as a domestic to Dr. John Aussem, living in the Faubourg Saint Antoine, with a salary of 30 louis in advance. Dr. Aussem reserved to himself the right to sell the services of his domestic to whomsoever he pleased during the ten years.

On the twenty-fifth of May, 1797 Dame Marie-Catherine Tessier, Widow of Antoine Janisse, in his lifetime a voy-

⁴ From Massicotte *ut supra* in *Le Bulletin des Recherches Historiques*, Vol. II, p. 136, it is said: "Une annonce publiée dans la Gazette de Québec vers: cette époque (*i. e.*, 1797) représente un nègre courant à toutes jambes. 'Il est offert une récompense honnête à qui remènera à son maître marchand de Trois Rivières son esclave fugitif' Ce pauvre diable pensait sans doute que la loi qu'on proposait pourrait pas d'effet retroactif."

ageur, liberated her slave Marie Antoine de Pade, an Indian, aged 23 years, in recognition of her services which she had rendered her, and in addition gave her a trousseau. On the twenty-fifth of August Thomas Blaney, gold painter, sold to Thomas John Sullivan, hotel-keeper of Montreal, the Negro Manuel about 33 years old for 36 louis, payable in monthly instalments of three louis each. On the same date and before the same notary, Sullivan promised the slave to liberate him in 5 years, if he served him faithfully. On the twenty-second of November George Westphall, formerly Lieutenant of the 6th Regiment, who owed 20 louis to Richard Dillon, proprietor of the Montreal Hotel in security for payment, delivered to his creditor a mulatress, a slave called Ledy, aged 26 years. She was to work with Mr. Dillon until he was repaid what was owed him by Westphall for principal and interest.

In the year 1793, there came up in the Court of Appeal at Quebec a case involving slavery but nothing was really decided. The plaintiff Jacob Smith sued Peter McFarlane in the Court of Common Pleas for taking away his wife and her clothes and detaining them. McFarlane claimed that Smith's wife was his slave. The Court of Common Pleas gave the plaintiff judgment for £100 and McFarlane appealed to the Court of Appeal. The Court pointed out that it was for McFarlane to prove that Smith's wife was his slave and that he had not done so: but as there had been error in the proceedings the case was sent back to be retried. It is important to notice that the court considered that if McFarlane could prove that Smith's wife was his slave, he had the right to take her away.⁵

A lawsuit also arose over the Negro Manuel (Allen) sold August 25, 1797, to Thomas John Sullivan. When Blaney sold him for £36 Sullivan paid down only half and the balance with interest £30.15.2 was sued for in the Court of King's Bench at Montreal in 1798. Sullivan pleaded that Manuel was not the plaintiff's slave but a free Negro

⁵ LaFontaine *ut supra*, pp. 49-51.

and that he had run away March, 1798, at Montreal where he continued to be: and Sullivan claimed to be reimbursed the £18 which he had paid. On the sixth of October Manuel himself came into the suit and claimed that "by the laws of this land he is not a slave but a freeman." Evidence was given that he had absconded from Sullivan's service alleging as a reason that he was a freeman, "that other blacks were free and that he wanted to be free also." In February, 1799, the court held that no title or right to sell Manuel has been shown and dismissed the action directing the return of the £18.⁶

In 1797 the Imperial Act of 1732 for the sale of Negroes and other hereditaments for debt in the American Plantations was repealed so far as it related to Negroes⁷ but this made no difference in their status. The courts, however, were becoming astute in favor of assisting those claiming freedom. In February, 1798, a certain female Negro slave called Charlotte belonging to Miss Jane Cook left her mistress and refused to return. On information laid she was committed by the magistrates to prison. She sued out a writ of habeas corpus from the Court of King's Bench at Montreal and Chief Justice, James Monk, ordered her release. On this becoming known, the Negroes of the city and district of Montreal became very threatening in their demeanor. Many renounced all service and one woman called Jude who had been bought at Albany in 1795 for £80 by Elias Smith, a merchant of Montreal, left her master and was committed to prison in the same way by the magistrates. Being brought up in the Court of King's Bench at Montreal on habeas corpus, Chief Justice Monk discharged her March 8, 1798 without deciding the question of slavery. The Chief Justice declared that he would set free every Negro, articted apprentice, or domestic servant who should be committed to prison in this way by the

⁶ LaFontaine *ut supra*, pp. 52 & 56.

⁷ For the Act of 1732 (5 George II, c. 7) see *ante* p. 13. The repealing Act was (1797) 37 George III, c. 119 (Imp.).

magistrates. But this was because the statute in force at that time⁸ which gave power to the magistrates to cause such due correction and punishment to be ministered to an apprentice as they thought fit and this empowered them to commit apprentices to the house of correction as a punishment, but it gave no authority to commit to a common gaol or other prison.

These decisions alarmed the owners of slaves: and a petition from many inhabitants of Montreal was presented to the House of Assembly April 19, 1799, by Joseph Papineau. This petition set forth the ordinance of the Intendant Randot in 1709⁹ the Act of 1732,¹⁰ that of 1790,¹¹ the facts concerning Charlotte, Jude and the other Negroes, the judgments of Chief Justice Monk, and the absence of any house of correction. It prayed that an Act should be passed that until a house of correction should be established every slave, Panis or Negro who should desert the service of his master, might be proceeded against in the same way as apprentices in England, and be committed to the common gaol of the District; and further that no one should aid or receive a deserting slave, or that there should be passed a law declaring that there was no slavery in the Province or such other provision concerning slaves should be made as the House should deem convenient.¹² The petition was laid on the table.

In 1799 there was passed an Act providing houses of correction for several districts, but no provision was made

⁸ The Statute of 1562, 5 Elizabeth, c. 4, not repealed until 1814, 54 George III, c. 96 (Imp.).

⁹ See ante, p. 3.

¹⁰ *Ibid.*, p. 13, n. 12.

¹¹ *Ibid.*, p. 37.

¹² "Ou qu'une loi puisse être passée déclarant qu'il n'y a point d'esclavage dans la Province: ou telle autre provision concernant les esclaves que cette Chambre, dans sa sagesse, jugera convenable." The Act of 1799 providing for houses of correction (really the common goal) was 39 George II, c. 6 (L. C.), and was to be in force for two years. It was amended and continued for four years by the Act (1802) 42 George III, c. 6 (L. C.) and again by (1806) 46 George III, c. 6 (L. C.), until January 1, 1810 when it expired.

concerning slavery. Perhaps the wisdom of this house proved insufficient to devise any "provision convenient."

The next year another petition was brought in by Papineau from certain inhabitants of the District of Montreal saying that doubts had been entertained how far property in Negroes and Panis was sustainable under the laws of the province. They cited Randot's ordinance, the recognition of slavery for years, and stated that in a recent case the Court of King's Bench at Montreal in discharging a slave of Mr. Fraser's who had been committed to the house of correction by three justices of the peace, had expressed the opinion that the Act of 1797¹³ had repealed all the laws concerning slavery. They asked that the House should pass an act declaring that with certain restrictions slavery did exist in the province and investing the owners with full property in the slave; and that this chamber should also pass such laws and regulations in the matter as should be thought advisable.¹⁴

The petition on motion of Messrs. Papineau and Black was referred to a committee of five, Papineau, Grant, Craigie, Cuthbert and Dumas. The committee reported and Cuthbert introduced on April 30, 1800, a bill to regulate the condition of slaves, to limit the term of their slavery and to prevent further introduction of slavery in the province. The bill passed the second reading and was referred to the Committee of the Whole, but got no further. The next year Cuthbert introduced a similar bill with the same result, and again in 1803. The reason for the failure of these attempts was that any legislation on slavery would in view of the decisions of the courts be reactionary and change for the worse the condition of the slave.

The most celebrated of these decisions was in the case

¹³ See ante, note 7. The effect of this Act was probably not as stated. The slave of Mr. Fraser's was Robin alias Robert to be spoken of *infra*, pp. 49, 50.

¹⁴ The two reasons given for the request are the familiar ones. The petitioners had paid large sums for the slaves who had left them and "they are all wholly convinced that that class of men really lazy leading an idle and abandoned life would attempt to commit crime."

of Robin, *alias* Robert, a black. James Fraser, a Loyalist of the colony of New York, became the owner of Robin a Negro man in 1773, before the American Revolution. The colonies were successful and provisional articles of peace were signed November 30, 1782. Congress proclaimed them April 11, 1783 and it was almost inevitable that they would become a permanent and definitive treaty. Article VII provided for the speedy evacuation by the British forces of territory to be allotted to the United States of America "without carrying away any negroes or other property of the American inhabitants." There was allowed full time for everyone who desired to live under the British flag to leave New York. James Fraser made up his mind to go to Nova Scotia and obtained a pass from William Walton, the Magistrate of Police of the city, for his slave Robin and another, Lydia, September 23, 1783.¹⁵ Fraser went to Shelborne, Nova Scotia, and the following year in September he went to "the Island of St. John,"¹⁶ accompanied by Robin who was and acknowledged himself to be Fraser's property. Afterwards Fraser brought him to the Current of Saint Mary near the city of Montreal where Fraser became a farmer. Robin, infected with the pernicious doctrines of freedom then rather prevalent left Fraser, March 19, 1799, and went to live with Richard, a tavern keeper in Montreal. Fraser laid an Information before Charles Blake, a justice of the peace, and January 31, 1800, Charles Blake, Robert Jones and James Dunlop, justices of the peace of the District of Montreal committed Robin to the "Common Gaol and House of Correction at Montreal" with a warrant to Jacob Kuhn "Keeper of His

¹⁵ The definitive treaty was in fact signed September 3, 1783, but not ratified by Congress until January 14, 1784. The armistice had been concluded January 20, 1783. In the definitive treaty, Article VII contains the same provisions as to Negroes as the corresponding article in the preliminary articles.

¹⁶ Isle St. Jean so called from about the end of the sixteenth century until 1798, when it was given the name Prince Edward Island out of compliment to Prince Edward, Duke of Kent (father of Queen Victoria), then commanding the British Forces in North America. The name it still retains.

Majesty's Jail and House of Correction" to receive "a negroman named Robert who refuses to go home to his owner and him safely to keep till he may be discharged or otherwise dealt with according to law."

In the February Term 1800 of the Court of King's Bench for the District of Montreal¹⁷ Mr. A. Perry, his advocate, obtained a writ of habeas corpus and on the tenth of February the black was produced in court. Mr. Perry for the black and Mr. Kerr for James Fraser presented their arguments upon this day and on the thirteenth of February, and after consideration and consultation the court five days later ordered the discharge of Robin alias Robert from his confinement under the warrant.¹⁸

The decision proceeded on the ground that the Act of 1797 which repealed the provision for the sale of Negroes to answer a judgment had revoked all the laws concerning slavery. Remembering that the Act of 1732 was intended to change the common law of England which did not allow the sale of land under a writ of execution, *fieri facias*, it should probably be considered that the sole effect of the repeal of the act as regards Negroes was to exempt them from sale under *fieri facias*, without affecting their status. And it is well known that slavery continued in the West India Islands and in Upper Canada long after the Act of 1797.

¹⁷ The Judges were James Monk, Chief Justice and Pierre Louis Panet and Isaac Ogden, Puisne Justices.

¹⁸ LaFontaine *ut supra*, pp. 56-63. It has often been said that it was Chief Justice Osgoode who gave the death blow to slavery in Lower Canada. For example, in James P. Taylor's *Cardinal facts of Canadian History*, Toronto, 1899, on p. 88 we find a statement that in 1803, Chief Justice Osgoode in Montreal declared slavery inconsistent with the laws of Canada. But Osgoode became Chief Justice of the Province in July, 1794. Continuing as such Chief Justice, he became Chief of the Court of King's Bench for the District of Quebec later on in the same year on the coming into force of the Act of 1794, 34 George III, c. 6, which erected two Courts of King's Bench, one for each District. James Monk became Chief Justice of the Court of King's Bench for the District of Montreal, which position he retained until 1825. Osgoode resigned his position and went to England in 1801 and lived in England until his death in 1824: he was never Chief Justice at Montreal.

The effect of the decisions while not technically abolishing slavery rendered it innocuous. The slave could not be compelled to serve longer than he would, and the burden of slavery was rather on the master who must support his slave than on the slave who might leave his master at will. The legislature refusing to interfere, the law of slavery continued in this state until the year 1833 when the Imperial Parliament passed the celebrated act which forever abolished slavery in British Colonies from and after August 1, 1834.¹⁹

As Lower Canada passed no legislation on slavery, the extradition of fugitives was made impossible and Canada became therefore an asylum for the oppressed in the United States. Before the Act of 1833 there was one instance of a request from the Secretary of State of the United States for the delivery up of a slave. The matter was referred to the Executive Council by Sir James Kempt, the Administrator of the Government.²⁰ The report of the Execu-

¹⁹ One result of these decisions was to induce the escape of Negro slaves from Upper Canada where slavery was lawful to Lower Canada. For example one hears of two of the three slaves whom Captain Allan brought with him into Upper Canada from New Jersey running away to Montreal. The owner pursued them to Montreal and searched for them in vain for ten days. The third slave, a woman, he sold with her child.

The Statute is (1833) 3, 4, William IV, c. 73 (Imp.). One result of this Act is exceedingly curious and to the philosophical lawyer exceedingly interesting. Slaves which had been real estate, as soon as the act was passed ceased to be such, and the benefit to be obtained from their labor until fully enfranchised and the money to be paid by the legislature as compensation for their freedom became personal estate. See the luminous judgment of the Judicial Committee of the Privy Council in *Richard v. Attorney General of Jamaica*, *Moore's Report of Cases in the Judicial Committee* (1848), Vol. 6, p. 381.

In a note on p. 35 of a paper in the *Transactions of the Royal Society of Canada*, 1900, on *La Déclaration de 1732*, M. 'Abbé Auguste Gosselin, Litt.D., F.R.S., Can., we read:

"On trouve dans le livre de Mgr. Tanguay *A travers les Registres*, p. 157, une notice sur l'Esclavage au Canada, avec un 'Tableau des familles possédant des esclaves de la nation des Panis.' L'esclavage ne fut définitivement aboli par une loi, en Canada, qu'en 1833."

The learned author does not mean that there was legislation on slavery in Canada in 1833, or that it was Canadian legislation which abolished slavery; for such was not the case.

²⁰ From September 8, 1828, to October 19, 1830.

tive Council shows the view held that "the Law of Canada does not admit a slave to be a subject of property."

At a meeting of the Executive Council of the Province of Lower Canada held at the Council Chamber in the Castle of St. Lewis, on Thursday, June 18, 1829, under Sir James Kempt, the Administrator of the Government, the following proceedings were had:

"Report of a Committee of the whole Council. Present The Honble. the Chief Justice in the Chair, Mr. Smith, Mr. DeLery, Mr. Stewart, and Mr. Cochran. On Your Excellency's reference of a letter from the American Secretary of State requesting that Paul Vallard accused of having stolen a Mulatto Slave from the State of Illinois may be delivered up to the Government of the United States of America together with the Slave.

"May it please Your Excellency,

"The Committee have proceeded to the consideration of the subject matter of this reference with every wish and disposition to aid the Officers of the Government of the United States of America in the execution of the laws of that dominion and they regret therefore the more that the present application cannot in their opinion be acceded to.

"In the former cases the Committee have acted upon the principle which now seems to be generally understood that whenever a crime has been committed and the perpetrator is punishable according to the *Lex Loci* of the country in which it is committed, the country in which he is found may rightfully aid the police of the country against which the crime was committed in bringing the criminal to justice—and upon this ground have recommended that fugitives from the United States should be delivered up.

"But the Committee conceive that the crimes for which they are authorized to recommend the arrest of individuals who have fled from other Countries must be such as are *mala in se*, and are universally admitted to be crimes in every nation, and that the offence of the individual whose person is demanded must be such as to render him liable to arrest by the law of Canada as well as by the law of the United States.

"The state of slavery is not recognized by the law of Canada nor does the law admit that any man can be the proprietor of another.

“Every slave therefore who comes into the province is immediately free whether he has been brought in by violence or has entered it of his own accord; and his liberty cannot from thenceforth be lawfully infringed without some cause for which the law of Canada has directed an arrest.

“On the other hand, the Individual from whom he has been taken cannot pretend that the slave has been stolen from him in as much as the law of Canada does not admit a slave to be a subject of property.

“All of which is respectfully submitted to Your Excellency’s Wisdom.”²¹

²¹ *Canadian Archives*, State K, p. 406.

CHAPTER V

UPPER CANADA—EARLY PERIOD

The first Parliament of the Province of Upper Canada sat at Newark formerly and now Niagara-on-the-Lake, September 17, 1792. The very first act of this first Parliament of Upper Canada reintroduced the English civil law.¹ This did not destroy slavery, nor did it ameliorate the condition of the slave. It was rather the reverse, for as the English law did not, like the civil law of Rome and the systems founded on it, recognize the status of the slave at all, when it was forced by grim fact to acknowledge slavery, it had no room for the slave except as a mere piece of property. Instead of giving him rights like those of the "servus," he was deprived of all rights, marital, parental, proprietary, even the right to live. In the English law and systems founded on it, the slave had no rights which the master was bound to respect.² At one time, indeed, it was understood in the English colonies that the master had the *jus vita necisque* over his slaves; but at the beginning of the eighteenth century the Crown much to the anger and disgust of the colonists made the murder of a Negro a capital offence, and at least some of the governors vigorously upheld this decision.³

Upper Canada was settled almost wholly by United Empire Loyalists who had left their homes in the revolted colonies and kept their faith to the Crown. Many of them

¹ The Statute is (1792) 32 George III, c. 1 (U. C.).

² Compare the opinion of the Chief Justice of the Supreme Court of the United States in the celebrated Dred Scott case. 19 Howard, 354, pp. 404, 405.

³ See as to this Reginald W. Jeffery, *The History of The Thirteen Colonies of North America 1497-1763* (London), p. 190. This interesting work which I have found accurate gives Governor Spotswood as enforcing the royal decree rigidly.

brought their slaves as well as their other property to the new land. The statute of 1790 encouraged this practice.⁴

The first Lieutenant-Governor of Upper Canada was Col. John Graves Simcoe. He hated slavery and had spoken against it in the House of Commons in England. Arriving in Upper Canada in the summer of 1792, he was soon made fully aware by the Chloe Cooley case that the horrors of slavery were not unknown in his new province. There came up to the Executive Council the complaint that a Negro girl thus named had been cruelly forced across the border and sold in the United States by one Vroomen. Much indignation was expressed by both citizens and officials.

⁴ See ante, p. 37.

⁵ This is copied from the *Canadian Archives*, Q. 282, pt. 1, pp. 212 sqq.; taken from the official report sent to Westminster by Simcoe. There is the usual amount of uncertainty in spelling names, Grisley or Crisley, Fromand, Frooman, Fromond or Fromond (in reality Vrooman).

The following is a report of a meeting of his Executive Council:

"At the Council Chamber, Navy Hall, in the County of Lincoln, Wednesday, March 21st, 1793.

"Present

"His Excellency, J. G. Simcoe, Esq., Lieut.-Governor, &c., &c.,

The Honble. Wm. Osgoode, Chief Justice,

The Honble. Peter Russell.

"Peter Martin (a negro in the service of Col. Butler) attended the Board for the purpose of informing them of a violent outrage committed by one Fromand, an Inhabitant of this Province, residing near Queens Town, or the West Landing, on the person of Chloe Cooley a Negro girl in his service, by binding her, and violently and forcibly transporting her across the River, and delivering her against her will to certain persons unknown; to prove the truth of his Allegation he produced Wm. Grisley (or Crisley).

"William Grisley an Inhabitant near Mississague Point in this Province says: that on Wednesday evening last he was at work at Mr. Froemans near Queens Town, who in conversation told him, he was going to sell his Negro Wench to some persons in the States, that in the Evening he saw the said Negro girl, tied with a rope, that afterwards a Boat was brought, and the said Frooman with his Brother and one Vanevery, forced the said Negro Girl into it, that he was desired to come into the boat, which he did, but did not assist or was otherwise concerned in carrying off the said Negro Girl, but that all the others were, and carried the Boat across the River; that the said Negro Girl was then taken and delivered to a man upon the Bank of the River by Froomand, that she screamed violently and made resistance, but was tied in the same manner as when the said William Grisley first saw her, and in that con-

The Attorney-General was John White⁶ an English lawyer of no great eminence indeed but of sufficient skill to know that the brutal master was well within his rights in acting as he did. He had the same right to bind, export, and sell his slave as to bind, export, and sell his cow. Chloe Cooley had no rights which Vrooman was bound to respect; and it was no more a breach of the peace than if he had been dealing with his heifer. Nothing came of the direction to prosecute and nothing could be done unless there should be an actual breach of the peace.

It is probable that it was this circumstance which brought about legislation. At the second session of the First Parliament which met at Newark, May 31, 1793, a bill was introduced and unanimously passed the House of Assembly. The trifling amendments introduced by the Legislative Council were speedily concurred in, the royal assent was given July 9, 1793, and the bill became law.⁷

Simcoe, as was his duty, reported to Henry Dundas afterwards Lord Melville, Secretary of State for the Home Department concerning this Act September 28, 1793.

dition delivered to the man . . . Wm. Grisley farther says that he saw a negro at a distance, he believes to be tied in the same manner, and has heard that many other People mean to do the same by their Negroes.

“RESOLVED—That it is necessary to take immediate steps to prevent the continuance of such violent breaches of the Public Peace, and for that purpose, that His Majesty’s Attorney-General, be forthwith directed to prosecute the said Fromond.

“ADJOURNED.”

⁶ John White was called to the bar in 1785 at the Inner Temple. He practised for a time but unsuccessfully in Jamaica and through the influence of his brother-in-law, Samuel Shepherd, and of Chief Justice Osgoode was appointed the first Attorney General of Upper Canada. It is probable, but the existing records do not make it certain, that it was he who introduced and had charge in the House of Assembly of the bill for the abolition of slavery passed in 1793, shortly to be mentioned. His manuscript diary is still extant, a copy being in the possession of the writer: One entry reads under date Newark Tuesday March 6 1793 “John Young from Grand River came with Mr. Mac-Michael respecting his runaway negro. Rec’d 5 Dols.”

⁷ The statute is (1793) 33 Geo. III, c. 7 (U. C.). The Parliament of Upper Canada had two houses, the Legislative Council, an upper house, appointed by the Crown; and the Legislative Assembly, a lower house or House of Commons, as it was sometimes called, elected by the people. The Lieutenant

Simcoe had discovered that there was much resistance to the slave law. There were many plausible arguments of the demand for labor and the difficulty of obtaining "Servants to cultivate Lands." "Some possessed of Negroes," said he, "knowing that it was very questionable whether any subsisting Law did authorize Slavery and having purchased several taken in war by the Indians at small prices wished to reject the Bill entirely; others were desirous to supply themselves by allowing the importation for two years. The matter was finally settled by undertaking to secure the property already obtained upon condition that an immediate stop should be put to the importation and that Slavery should be gradually abolished."⁸

The Act recited that it was unjust that a people who enjoy freedom by law should encourage the introduction of slaves, and that it was highly expedient to abolish slavery in the province so far as it could be done gradually without violating private property. It repealed the Imperial Statute of 1790 so far as it related to Upper Canada, and to enact that from and after the passing of the act "No Negro or other person who shall come or be brought into this Province . . . shall be subject to the condition of a slave or to bounden involuntary service for life." With that regard for property characteristic of the English-

Governor gave the royal assent. The bill was introduced in the Lower House, probably by Attorney General White, as stated in last note, and read the first time, June 19. It went to the committee of the whole June 25, and was the same day reported out. On June 26 it was read the third time, passed and sent up for concurrence. The Legislative Council read it the same day for the first time, went into committee over it the next day, June 28, and July 1, when it was reported out with amendments, passed and sent down to the Commons July 2. That house promptly concurred and sent the bill back the same day. See the official reports: *Ont. Arch. Reports for 1910* (Toronto, 1911), pp. 25, 26, 27, 28, 32, 33. *Ont. Arch. Rep. for 1909* (Toronto, 1911), pp. 33, 35, 36, 38, 41, 42.

⁸ *Canadian Archives*, Q. 279, 2, p. 335.

White in his diary says "To the 21 June, some opposition in the House not much"—under date June 25 when the Bill was in Committee of the whole he says "Debated the Slave Bill hardly: Met much opposition but little argument."

speaking peoples, the act contained an important proviso which continued the slavery of every "negro or other person subjected to such service" who had been lawfully brought into the province. It then enacted that every child born after the passing of the act, of a Negro mother or other woman subjected to such service, should become absolutely free on attaining the age of twenty-five, the master in the meantime to provide "proper nourishment and cloathing" for the child, but to be entitled to put him to work, all issue of such children to be free whenever born. It further declared that any voluntary contract of service or indenture should not be binding longer than nine years. Upper Canada was the first British possession to provide by legislation for the abolition of slavery.⁹

⁹ Simcoe was almost certainly the prime mover in the legislation of 1793. When giving the royal assent to the bill he said: "The Act for the gradual abolition of Slavery in this Colony, which it has been thought expedient to frame, in no respect meets from me a more cheerful concurrence than in that provision which repeals the power heretofore held by the Executive Branch of the Constitution and precludes it from giving sanction to the importation of slaves, and I cannot but anticipate with singular pleasure that such persons as may be in that unhappy condition which sound policy and humanity unite to condemn, added to their own protection from all undue severity by the law of the land may henceforth look forward with certainty to the emancipation of their offspring." See *Ont. Arch. Rep. for 1909*, pp. 42-43.

I do not understand the allusion to "protection from undue severity by the Law of the land." There had been no change in the law, and undue severity to slaves was prevented only by public opinion. It is practically certain that no such bill as that of 1798 would have been promoted with Simcoe at the head of the government as his sentiments were too well known.

Vermont excluded slavery by her Bill of Rights (1777), Pennsylvania and Massachusetts passed legislation somewhat similar to that of Upper Canada in 1780; Connecticut and Rhode Island in 1784, New Hampshire by her Constitution in 1792, Vermont in the same way in 1793; New York began in 1799 and completed the work in 1827, New Jersey 1829. Indiana, Illinois, Michigan, Wisconsin and Iowa were organized as a Territory in 1787 and slavery forbidden by the Ordinance, July 13, 1787, but it was in fact known in part of the Territory for a score of years. A few slaves were held in Michigan by tolerance until far into the nineteenth century notwithstanding the prohibition of the fundamental law (*Mich. Hist. Coll.*, VII, p. 524). Maine as such probably never had slavery, having separated from Massachusetts in 1820 after the Act of 1780; although it would seem that as late as 1833 the Supreme Court of Massachusetts left it open when slavery was

It will be seen that the statute did not put an end to slavery at once. Those who were lawfully slaves remained slaves for life unless manumitted and the statute rather discouraged manumission, as it provided that the master on liberating a slave must give good and sufficient security that the freed man would not become a public charge. But, defective as it was, it was not long without attack. In 1798, Simcoe had left the province never to return, and while the government was being administered by the time-serving Peter Russell,¹⁰ a bill was introduced into the Lower House to enable persons "migrating into the province to bring their negro slaves with them." The bill was contested at every stage but finally passed on a vote of eight to four. In the Legislative Council it received the three months' hoist and was never heard of again.¹¹ The

abolished in that State (*Commonwealth v. Aves*, 18 Pick. 193, 209). (See Cobb's *Slavery*, pp. clxxi, clxxii, 209; Sir Harry H. Johnston's *The Negro in the New World*, an exceedingly valuable and interesting work, but not wholly reliable in minutiae, pp. 355 et seq.)

¹⁰ Russell became administrator of the Government of Upper Canada, July 21, 1796, and held that position until the arrival of the new Lieutenant-Governor General Peter Hunter, August 16, 1799.

¹¹ *Ont. Arch. Rep. for 1909*, pp. 64, 69, 70, 71, 75; *ibid.* for 1910, pp. 67, 68, 69, 70.

The bill was introduced in the Lower House by Christopher Robinson, member for Addington and Ontario. He was a Virginian Loyalist, who in 1784 emigrated to New Brunswick, and in 1788 to that part of Canada, later Lower Canada; and in 1792 to Upper Canada. Accustomed from infancy to slavery, he saw no great harm in it—no doubt he saw it in its best form.

The chief opponent of the bill was Robert Isaac Dey Gray, the young Solicitor General, the son of Major James Gray, a half-pay British Officer. He studied law in Canada. He was elected member of the House of Assembly for Stormont in the election of 1796, and again in 1804.

The motion for the three months' hoist in the Upper House was made by the Honorable Richard Cartwright seconded by the Honorable Robert Hamilton. These men, who had been partners, generally agreed on public measures and both incurred the enmity of Simcoe. He called Hamilton a Republican, then a term of reproach distinctly worse than Pro-German would be now, and Cartwright was, if anything, worse. But both were men of considerable public spirit and great personal integrity. For Cartwright see *The Life and Letters of Hon. Richard Cartwright*, Toronto, 1876. For Hamilton see Riddell's edition of *La Rochefoucault's Travels in Canada in 1795* (Toronto, 1817), in *Ont. Arch. Rep. for 1916*; Miss Carnochan's *Queen-*

argument in favor of the bill was based on the scarcity of labor which all contemporary writers speak of, the inducement to intending settlers to come to Upper Canada where they would have the same privileges in respect of slavery as in New York and elsewhere; in other words the inevitable appeal to greed.

After this bill became law, slavery gradually disappeared. Public opinion favored manumission and while there were not many manumissions *inter vivos*¹² in some measure owing to the provisions of the act requiring security to be given in such case against the free man becoming a public charge, there were not a few emancipated by will.¹³

ston in Early Years, Niagara Hist. Soc. Pub. No. 25; Buffalo Hist. Soc. Pub. Vol. 6, pp. 73-95.

There was apparently no division in the Upper House although there were five other Councillors in addition to Cartwright and Hamilton in attendance that session, viz.: McGill, Shaw, Duncan, Baby and Grant; and the bill passed the committee of the whole.

¹²Slaves were valuable even in those days. A sale is recorded in Detroit of a "certain Negro man Pompey by name" for £45 New York Currency (\$112.50) in October, 1794; and the purchaser sold him again January, 1795, for £50 New York Currency (\$125.00). (*Mich. Hist. Coll., XIV, p. 417.*) But it would seem that from 1770 to 1780 the price ranged to \$300 for a man and \$250 for a woman (*Mich. Hist. Coll., XIV, p. 659*). The number of slaves in Detroit is said to have been 85 in 1773 and 179 in 1782 (*Mich. Hist. Coll., VII, p. 524*).

¹³A number of interesting wills are in the Court of Probate files at Osgoode Hall, Toronto. One of them deserves special mention, viz.: that of Robert I. D. Gray, the first Solicitor General of the Province, whose death was decidedly tragic. In this will, dated August 27, 1803, a little more than a year before his death, he releases and manumits "Dorinda my black woman servant . . . and all her children from the State of Slavery," in consequence of her long and faithful services to his family. He directs a fund to be formed of £1,200 or \$4,800 the interest to be paid to "the said Dorinda her heirs and Assigns for ever." To John Davis, Dorinda's son, he gave 200 acres of land, Lot 17 in the Second Concession of the Township of Whitby and also £50 or \$200. John, after the death of his master whose body servant and valet he was, entered the employ of Mr., afterwards Chief, Justice Powell; but he had the evil habit of drinking too much and when he was drunk he would enlist in the army. Powell got tired of begging him off and after a final warning left him with the regiment in which he had once more enlisted. Davis is said to have been in the battle of Waterloo; he certainly crossed the ocean and returned later on to Canada. He survived till 1871, living at Cornwall, Ontario, a well-known character—with him, died the last of all those

The number of slaves in Upper Canada was also diminished by what seems at first sight paradoxical, that is, their flight across the Detroit River into American territory. So long as Detroit and its vicinity were British in fact and even for some years later, Section 6 of the Ordinance of 1787 "that there shall be neither slavery nor involuntary servitude in the said territory otherwise than as punishment of crime" was a dead letter: but when

who had been slaves in the old Province of Quebec or the Province of Upper Canada.

In the *Canadian Archives*, M. 393, is the copy of a letter, the property of the late Judge Pringle of Cornwall, by Robert I. D. Gray to his sister Mrs. Valentine dated at Kempton, February 16, 1804, and addressed to her "at Captain Joseph Anderson's, Cornwall, Eastern District": speaking of a trip to Albany, New York, he says:

"I saw some of our old friends while in the states, none was I more happy to meet than Lavine, Dorin's mother. Just as I was leaving Albany I heard from our cousin Mrs. Garret Stadts who is living in Albany in obscurity and indigence owing to her husband being a drunken idle fellow, that Lavine was living in a tavern with a man of the name of Broomly. I immediately employed a friend of mine, Mr. Ramsay of Albany, to negotiate with the man for the purchase of her. He did so stating that I wished to buy her freedom, in consequence of which the man readily complied with my wishes, and altho' he declared she was worth to him £100 (*i.e.*, \$250) he gave her to me for 50 dollars. When I saw her, she was overjoyed and appeared as happy as any person could be, at the idea of seeing her child Dorin, and her children once more, with whom if Dorin wishes it, she will willingly spend the remainder of her days. I could not avoid doing this act, the opportunity seemed to have been thrown in my way by providence and I could not resist it. She is a good servant yet—healthy & strong and among you, you may find her useful, I have promised her, that she may work as much or as little as she pleases while she lives—but from the character I have of her, idleness is not her pleasure, I could not bring her with me, she wanted to see some of her children before she sets out; I have paved the way for her, and some time this month, Forsyth, upon her arrival here will forward her to you. . . ."

Then follows a pathetic touch:

"I saw old Cato, Lavine's father at Newark, while I was at Col^l. Ogden's; he is living with Mrs. Gouverneur—is well taken care of & blind—poor fellow came to *feel* me, for he could not *see*, he asked affectionately after the family."

In the will of the well-known Colonel John Butler of Butler's Rangers there are bequests to his son Andrew of "a negro woman named Pat": to his grandson John of "a Negro Boy named George . . . until the said negro arrives at the years that the Law directs to receive his freedom" and to John's sister Catharine "a negro girl named Jane" for a similar time.

Michigan was incorporated as a territory in 1805, the Ordinance of 1787 became legally and at least in form effective. Many slaves made their way from Canada to Detroit, then a real land of the free; so many, indeed, that we find that a company of Negro militia composed entirely of escaped slaves from Canada was formed in Detroit in 1806 to assist in the general defence of the territory.¹⁴

¹⁴ *Michigan Hist. Coll.*, XIV, p. 659. But the actual effect of the Ordinance of 1787, even after 1805 was not absolute. "As late as 1807 Judge Woodward refused to free a negro man and woman on a writ of habeas corpus, holding in effect that as they had been slaves at the time of the surrender in 1796, there was something in Jay's Treaty that forbade their release." *Michigan as a Province, Territory and State*, 1906, p. 339. "There is a tradition that even as late as the coming of Gen. John T. Mason, as Secretary of the Territory in 1831, he brought some domestic slaves with him from Virginia. It is not improbable that a few domestic servants continued with their old Masters down to the time of the adoption of the State Constitution" (in 1835). *Ibid.*, p. 338, note.

Before Detroit and its adjoining territory were given up by the British to the Americans under Jay's Treaty, August, 1796, there were many instances of slaves escaping from the United States territory to British territory in that neighborhood and vice versa. One instance of escape from British territory will suffice.

Colonel Alexander McKee, a well-known and very prominent Loyalist of Detroit, lost a mulatto slave in 1795 and his friend and colleague Captain Matthew Elliott sent a man David Tait to look for him in what is now Indiana. Tait's success or want of success is shown by his affidavit before George Sharp a justice of the peace for the Western District of Upper Canada residing in Detroit. The whole deposition will be given as it illustrates the terms on which the two peoples were living at the time in that country, and shows that even then the charges were made which were afterwards made one of the pretexts for the War of 1812. It is given in the *Mich. Hist. Coll.*, Vol. XII, pp. 164, 165.

"DEPOSITION

"I being sent by Captain Elliott in search of a Molato man name Bill the property of Colonel McKee, which was thought to be at Fort Wayne, But on my Arrival at the Glaize was inform'd by the officer there that he was gone, they said he had gained his liberty, by getting into their lines he being stole from their Country.

"They abused the Gentlemen in this place very & Told me that Governor Sancom (Simcoe) Colonel England and Captain Elliott caused bills in print to be dropped near their fort, Encouraging their Soldiers to desert.

"They called Coll McKee & Capt Elliott dam'd rascals and said that they gave the Indians Rum to make them Drunk to prevent them from going to Council & That Capt Brent they said was a Dam'd rascal and had done every-

The number of slaves in Upper Canada cannot be ascertained with anything approaching accuracy. The returns of the census of 1784 show that very many of the 212 slaves in the District of Montreal, which then extended from the Rivers St. Maurice and Godfrey to the Detroit River *de jure* and to the Mississippi *de facto*, were the property of the United Empire Loyalists on the St. Lawrence in territory which in 1791 became part of the new Province of Upper Canada.

The settlement crept up the St. Lawrence and Lake Ontario so as to be as far as the River Trent by the end of the eighteenth century: and Prince Edward County had also its quota of settlers. Until the nineteenth century had set in there were practically no settlers from the Trent to near York (Toronto) but that splendid territory of level clay and loam land covered by magnificent forests of beech and maple gradually filled in and by the 30's was fairly well settled. In the latter territory there were very few, if any, slaves.¹⁵

Farther east, however, in what became the Eastern and Midland Districts there were many slaves. It is probable that by far the greatest number had their habitat in that region. When York became the provincial capital (1796-7) slaves were brought to that place by their masters. In the Niagara region there were also some slaves, in great part bought from the Six Nation Indians as some of these in the eastern part of the province were bought from the Mis-

thing in his power against them. But they said in Course of Nine Months that they Expected to be in full possession of Detroit and all the Country between their & it & I begged liberty to withdraw when Major Hunt told me to make the best of my way from Whence I came, while I was getting ready to return the Serjeant of their Guard came & Told me it was the Majors orders that I should leave the place immediately & not to stay about any of the Indian Camps. Which Orders I obeyed.

(signed) DAVID TAIT.

Sworn before me at Detroit 4th August 1795.

GEO SHARP, J. P. W. D."

Indian Affairs, M. G. VII.

¹⁵ I have found no reliable accounts of slaves in this region—some traditions which I have investigated proved unreliable and illusory.

sissaguas who had a rendezvous on Carleton Island near Kingston. In the Detroit region there were many slaves, some of them Panis;¹⁶ and many of both kinds, Panis and Negro bought from the Shawanese, Pottawattaimies and other Western Indians, taken for the most part from the Ohio and Kentucky country. Most of these slaves were west of the river, few being in the Province of Upper Canada *de jure*. Omitting Detroit, the number of slaves in the province at the time of the Act of 1793 was probably not far from 500.¹⁷

In the Eastern District, part of which became the District of Johntown in 1798, there were certainly some slaves. Justus Sherwood one of the first settlers brought a Negro slave Caesar Congo to his location near Prescott. Caesar was afterwards sold to a half pay officer Captain Bottom settled about six miles above Prescott and after about twenty years service was emancipated by his master. Caesar afterwards married a woman of color and lived in Brockville for many years and until his death. Daniel Jones another old settler had a female Negro slave and there were a few more slaves in the district.¹⁸

¹⁶ I cannot trace many Panis slaves in Upper Canada proper; that there were some at Detroit is certain and equally certain that some were at one time on both shores of the Niagara River. I do not know of an account of the numbers of slaves at the time; in Detroit, March 31, 1779, there were 60 male and 78 female slaves in a population of about 2,550 (*Mich. Hist. Coll.*, X, p. 326); Nov. 1, 1780, 79 male and 96 female slaves in a somewhat smaller population (*Mich. Hist. Coll.*, XIII, p. 53); in 1778, 127 in a population of 2,144 (*Mich. Hist. Coll.*, IX, p. 469); 85 in 1773, 179 in 1782 (*Mich. Hist. Coll.*, VII, p. 524); 78 male and 101 female (*Mich. Hist. Coll.*, XIII, p. 54). The Ordinance of Congress July 13, 1787, forbidding slavery "northwest of the Ohio River" passed with but one dissenting voice, that of a delegate from New York, was quite disregarded in Detroit (*Mich. Hist. Coll.*, I, 415); and indeed as has been said, Detroit and the neighboring country remained British (*de facto*) until August, 1796, and part of Upper Canada from 1791 till that date.

¹⁷ This is indicated by a number of facts none of much significance and all together far from conclusive—but it is a mere estimate perhaps not much more than a guess and I should not be astonished if it were proved that the estimate was astray by 100 either way. Indeed contemporary estimates gave for the Nassau District alone in 1791, 300 Negro slaves and a few Panis. Col. Mathew Elliott in 1784 brought more than 50 slaves to his estate at Amherstburg.

It is possible that this part of the province was the home of a Negro who at the age of 101 appeared at the Assize Court at Ottawa in 1867 to give evidence. He was born in the Colony of New York in 1766, had been brought to Upper Canada by his master, a United Empire Loyalist, had fought through the war of 1812 on the British side, was present at the Battles of Chippewa and Lundy's Lane and was wounded at Sackett's Harbor.¹⁹

In the Midland District at Kingston such leading families as the Cartwrights, Herkimers and Everetts were slave owners. Further west the Ruttans, Bogarts, Van Alstyne,²⁰ Petersons, Allens, Clarks, Bowers, Thompsons, Meyers, Spencers, Perrys, Pruyns, speaking generally all the people of substance had their slaves.²¹

¹⁹ See letter of Sheriff Sherwood, *Papers &c, Ontario Historical Society* 1901, Vol. 3, p. 107. Justus Sherwood came from Vermont, originally from Connecticut, joined Burgoyne's army in 1777 and came to Canada in 1778, joined Rogers' Rangers and served during the war. He came to Prescott in 1784. He had had a not unusual experience with the Continentals. His "Negro wench and two negroe children" had been seized and "sold to Wm. Drake." (Second *Ont. Arch. Rep.*, 1904, p. 820.) Daniel Jones, father of Sir Daniel Jones of Brockville, came from Charlotte County, New York (*ibid.*, p. 398). He was also a native of Connecticut.

¹⁹ He was in full possession of all his faculties and had been brought to Ottawa to prove the death of one person in 1803 and of another in 1814. The action was *Morris v. Henderson* "Ottawa Citizen" May 3, 1867. Robert I. D. Gray mentioned in note 13 above, came from this district.

²⁰ A Van Alstyne—Major Peter Van Alstyne—was elected to represent Prince Edward County in the first Legislative Assembly when Philip Dorland was unseated because he would not take the prescribed oath being a Quaker.

²¹ See the interesting paper read before the Women's Historical Society of Toronto by Mrs. W. T. Hallam, B.A., and published in *The Canadian Churchman*, May 8, 1919, republished in pamphlet form. I am authorized by Mrs. Hallam to make full use of her researches and I take advantage of this permission. Mrs. Hallam has also the following:

"There is an old orchard between Collins Bay and Bath, Ontario, now used as a garden, which belongs to the Fairfield family. The children of this Loyalist family brought the seeds in their pockets from the old home in Vermont, and here lie buried the slaves belonging to the Fairfield and Pruyn families. On the way over they milked the cows, which were brought with them, and sometimes the milk was the only food which they had. The old Fairfield Homestead, built in 1793, is still standing, but the negro quarters are unused, for as those who live there say, 'On a hot day you would declare the slaves were still there.'"

It may be noted that there are many records of births, deaths and marriages of slaves. In the Register for the Township of Fredericksburg (Third Township) of the Reverend John Langhorn, Anglican clergyman, we find in 1791, November 13, that he baptized "Richard son of Pomps and Nelly a negro living with Mr. Timothy Thompson."²² On October 6, 1793, "Richard surnamed Pruyn a negro, living with Harmen Pruyn," on March 2, 1796, "Betty, surnamed Levi, a negro girl living with Johannes Walden Meyers" of the Township of Thurlow. On April 22, 1805, "Francis, son of Violet, a negro woman living with Hazelton Spencer²³ Esq. by Francis Green." We find

Miss Alice Fairfield of the White House, Collins Bay, a descendant of these Fairfields gives the following account in a paper read before the Woman's Historical Society, Toronto (of which Mrs. Seymour Corley of Toronto has been good enough to furnish me a copy) "In March 1799, Stephen Fairfield married Maria Pruyn (from Kinder Hook, N. Y.), whose marriage portion included several slaves. They remained with the family as a matter of course after the law had given them their freedom. Of their devotion a story is told—"Mott" the old black nurse of my great grandmother walked to York (Toronto) a distance of 160 miles in cold weather to warn her of a plot against her property—the shoes were literally worn off her feet." The writer adds "The Tory branch of the Fairfield family that came to Canada were from Paulet County, Vermont . . . they brought some 'niggers' as they called their black slaves, into Canada." "The first apples grown in the country were raised from the seeds of apples with which the children had filled their pockets at the old home."

A contributor to the *Napanee Banner* writes:

"There has been considerable controversy of late whether slaves ever were owned in this section of Canada. The Allens brought three slaves with them who remained with the family for years. Thomas Dorland also had a number of slaves who were members of the house-hold as late as 1820. The Pruyns who lived on the front of Fredericksburg had, we are informed, over a dozen slaves with them. The Ruttans of Adolphustown brought two able-bodied slaves with them. Major Van Alstyne also had slaves; so had John Huyck who lived north of Hay Bay, and the Bogarts near neighbors, and the Trampours of the opposite side of Hay Bay. The Clarks of Ernestown, now called Bath, owned slaves who were with them years after their residence in Canada. The Everetts of Kingston Township and the Cartwrights of Kingston had theirs."

²² A man of considerable note: in 1800 appointed with Richard Cartwright, Commissioner to settle the finances between the two Provinces.

²³ Member for Lenox, Hastings and Northumberland Counties in the first Legislative Assembly: and afterwards Sheriff.

that "Francis, son of Violet . . . by Francis Green as was supposed" was buried January 17, 1806.²⁴

In a paper by the late J. C. Hamilton, a barrister of Toronto, he says that Lieutenant Governor Sir Alexander Campbell had favored him with a note concerning slaves at Kingston, which concluded "I had personally known two slaves in Canada: one belonging to the Cartwright and the other to the Forsyth family."²⁵ When I remember them in their old age, each had a cottage, surrounded by many comforts on the family property of his master and was the envy of all the old people in the neighborhood."²⁶

York (Toronto) and its neighborhood were settled later but they received their quota of Negro slaves, at least the town did. In 1880, the *Gazette* at York announces to be sold "a healthy strong negro woman, about thirty years of age; understands cooking, laundry and the taking care of poultry. N. B. She can dress ladies' hair. Enquire of the Printers, York, Dec. 20, 1800."²⁷

The best people in the capital owned Negroes. Peter Russell who had been administrator of the government of the province and therefore the head of the State advertised in the *Gazette and Oracle* of February 19, 1806:

"To be sold: a Black Woman named Peggy, aged forty years and a Black Boy her son named Jupiter, aged about fifteen years, both of them the property of the Subscriber. The woman is a tolerable cook and washerwoman and perfectly understands making soap and candles. The boy is tall and strong for his age, and has been employed in the country business but brought up principally as a house servant. The price of the woman is one hundred and fifty dollars. For the boy two hundred dollars payable in three

²⁴ The Pruyns of Fredericksburg are credited with owning more slaves than any other family in that region. Mrs. Hallam, *ut supra*, p. 4.

The above extracts are taken from the Registers published by the *Ont. Hist. Soc.*, Vol. 1.

²⁵ Both prominent families in Kingston.

²⁶ *Trans. Can. Inst.*, Vol. 1 (1889-1890), p. 106.

²⁷ For this and the following incident see that most interesting book "*Toronto of Old*" by Henry Scadding, D.D., Toronto, 1873, pp. 293, 294, 295.

years with interest from the day of sale and to be secured by bond, &c. But one-fourth less will be taken for ready money."

Peggy was not a satisfactory slave, she had awkward visions of freedom. On September 2, 1803, Russell advertised: "The subscriber's black servant Peggy not having his permission to absent herself from his service, the public are hereby cautioned from employing or harbouring her without the owner's leave. Whoever will do so after this notice may expect to be treated as the law directs."

Peggy was not the only slave who was dissatisfied with her lot. On March 1, 1811, William Jarvis, the Secretary of the Province "informed the Court that a negro boy and girl, his slaves, had the evening before been committed to prison for having stolen gold and silver out of his desk in his dwelling house and escaped from their said master; and prayed that the Court would order that the said prisoners with one Coachly a free negro, also committed to prison on suspicion of having advised and aided the said boy and girl in eloping with their master's property. . . ." It was "ordered that the said negro boy named Henry commonly called Prince be recommitted to prison and there safely kept till discharged according to law and that the said girl do return to her said master and Coachly be discharged."²⁸

Jarvis had slaves when he resided at Niagara. We find in the Register of St. Mark's Parish there an entry of Feb-

²⁸ Henry Scadding's *Toronto of Old*, p. 296. Dr. Scadding, speaks of his "in former times" gazing at Amy Pompadour with some curiosity.

Miss Elizabeth Russell, sister of the Administrator, had a slave, a pure Negro Amy Pompadour, whom she gave to Mrs. Denison wife of Captain John Denison, an old comrade in arms of her brother's.

²⁹ *Ibid.*, p. 292. The boy if he had stolen his master's money would be guilty of grand larceny, a capital offence at the time and consequently not tried at the Quarter Sessions. He was, therefore, recommitted to prison to await the Court of Oyer and Terminer and General Gaol Delivery commonly called the Assizes.

The master probably withdrew the charge against the girl and Coachly, or they may have been so fortunate as that there was no evidence against them.

ruary 5, 1797, of Moses and Phoebe, Negro slaves of Mr. "See'y Jarvis." Nor is this a unique entry, for we find this: "1819 April 4, Cupitson Walker and Margt. Lee (of Colour)," but these may have been free.

There were baptized: "1793, January 3, Jane a daughter of Martin, Col. Butler's Negro," "1794, September 3, Cloe, a mulatto," "1800, March 29, Peggy a mulatto (*filia populi*)," "1807, May 10, John of a negro girl (*filius populi*)" and in the same list was a soldier shot for desertion, a soldier who shot himself, "an unfortunate stranger," "R. B. Tickel, alas he was starved," an Indian child, "Cut-nose Johnson, a Mohawk chief" and there is recorded the burial of "Mrs. Waters a negro woman," September 29, 1802.³⁰

Slaves continued to run away. Colonel Butler in the *Upper Canada Gazette* of July 4, 1793, advertised a reward of \$5 for his "negro-man servant named John."³¹ On August 28, 1802, Mr. Charles Field of Niagara advertised in the *Herald*: "All persons are forbidden harbouring, employing or concealing my Indian Slave Sal, as I am determined to prosecute any offender to the extremity of the law and persons who may suffer her to remain in or upon their premises for the space of half an hour, without my

³⁰ See the lists in the *Ont. Hist. Soc. Papers* (1901), Vol. 3, pp. 9 sqq.

In the list of marriages are found: "1797, Oct. 12, Cuff Williams and Ann, Negroes from Mr. C. McNabb"; "1800, Dec. 1, Prince Robinson and Phillis Gibson, Negroes" and six other marriages down to 1831 between persons "of Colour". These last were probably not slaves.

That Joseph Brant, "Thayendinaga," the celebrated Indian Chief, had Negro slaves has been confidently asserted and as confidently denied. That there were Negroes in his household seems certain and their *status* was inferior. Whether he called them slaves or not, it is probable that he had full control of them. See *Stone's Life of Brant*, New York, 1838. He rather boasted of his slaves. He was attended on his journeys and at table by two of them, Patton and Simon Ganseville. Hamilton in his *Osgoode Hall*, Toronto, 1904, says (p. 21): "Thayendinaga lived surrounded with slaves and retainers in barbarous magnificence at Burlington." But that is rhetoric.

³¹ *Trans. Can. Inst.*, Vol. 1 (1889-1890), p. 105.

written consent will be taken as offending and dealt with accordingly.”³²

There was always a demand for good slaves. For example, in the *Gazette and Oracle* of Niagara October 11, 1797, W. & J. Crooks of West Niagara “Wanted to purchase a negro girl of good disposition”: a little later, January 2, 1802 the *Niagara Herald* advertised for sale “a negro man slave, 18 years old, stout and healthy; has had the Smallpox and is capable of service either in the house or out-doors. The terms will be made easy to the purchaser, and cash or new lands received in payment.” On January 18, 1802, the *Niagara Herald* proclaimed for sale: “the negro man and woman, the property of Mrs. Widow Clement. They have been bred to the business of a farm; will be sold on highly advantageous terms for cash or lands.”³³

Slavery in Upper Canada continued until the Imperial Act of 1833³⁴ but there does not seem to be any record of sales after 1806. Probably the last slaves to become free were two who are mentioned by the late Sir Adam Wilson, Chief Justice successively of the Courts of Common Pleas and Queen’s Bench at Toronto. These were “two young slaves, Hank and Sukey whom he met at the residence of Mrs. O’Reilly, mother of the venerable Miles O’Reilly, Q. C., in Halton County about 1830. They took freedom under the Act of 1833 and were perhaps the last slaves in the province.”³⁵

³² Dr. Scadding *ut supra*, p. 295. This is almost the only trace of Panis slavery in Upper Canada, proper, which I have found. The attempt to make a crime by the advertiser is not without precedent or imitation: it was, however, merely a threat and a *brutum fulmen*.

³³ Dr. Scadding *ut supra*, pp. 294, 295.

Such advertisements as these of 1802 indicate an uneasiness as to the security of the slave property. Dr. Scadding remarks “Cash and lands were plainly beginning to be regarded as less precarious property than human chattels,” *ibid.*, p. 295.

³⁴ See *supra*, p. 51.

³⁵ *Trans. Can. Inst.*, *ut supra*, p. 106.

These if actual slaves could not have been very young. If they were brought into the province after the Act of 1793 they would become free *ipso*

In the Detroit neighborhood there were undoubtedly many slaves, Panis and Negro: most of these were lost to the province on the delivery up of the retained territory in 1796 under the provisions of Jay's Treaty. But some were on the Canadian side and some were brought over by their masters on the surrender. Colonel Matthew Elliott who settled in 1784 just below Amherstburg brought many slaves, some sixty it is said. The remains of slave quarters are still in existence on the place. Jacques Duperon Baby the well-known fur-trader had at least thirty.

Antoine Louis Descompte dit Labadie, who raised a family of thirty-three children was the owner of slaves also. He was a wealthy farmer of the Township of Sandwich (now Walkerville) and died in 1806, aged 62. On May 26, 1806, he made at Sandwich his will by which he made the following bequest: "I also give and bequeath to my wife the use or service of two slaves that she may select, as long as she continues to be my widow." After a number of bequests there follows: "I will that all my personal property not here above bequeathed as well as my slaves with the exception of the two left to my wife, be portioned out or sold, and that the proceeds arising therefrom be equally divided between my said wife and the nine children³⁶ born out of my marriage with her."

Some of these slaves were probably Panis. There is extant a parchment receipt dated at Detroit, October 10, 1775, which reads:

"Je certifie avoir vendu et livré au Sieur Labadie, une esclave Paniese³⁷ nommée Mannon pour et en considération de la quantité de quatre-vingt minots³⁸ de Blé de froment qu'il doit me payer

facto. If born after that Act they would not properly speaking be slaves at all but only subject to service until the age of 25.

If they were slaves they must have been at least 37 in 1830; but probably they were born after 1793 and had not attained the age of 25 in 1833. They might then be young as described by Sir Adam.

³⁶ Labadie had been twice married.

³⁷ For "Panise."

³⁸ The French minot is 39.36 litres; the Canadian 36.34 litres or 63.94 pints—the bushel is 64 pints—the Canadian minot is consequently almost exactly one bushel.

à mesure qu'il aura au printemps prochain, donné sous ma main au Detroit ce dixième jour d'Octobre, 1775.

Temoin

(Signé) James Sterling³⁹

Signé) John Porteous.

Some of the reports of judges who presided over criminal assizes, moreover, contain references to slavery. Mr. Justice Powell tried a Negro, Jack York, with a jury at Sandwich for burglary in 1800. He was found guilty and in accordance with the law at that time, was sentenced to death. Powell respited the prisoner that the pleasure of the Lieutenant Governor might be known. The Lieutenant-Governor at that time was General Peter Hunter a rigid disciplinarian. Hunter wrote Powell that as York had been convicted of "the most atrocious offence without any circumstances of doubt or alleviation" he was to be hanged. When York was made aware of his fate, he promptly escaped from the ramshackle gaol at Sandwich.

In the proceedings Captain McKee informed the judge that the main witness had "been an Indian prisoner redeemed by his father and had lived in his kitchen and he did not think her credit good." She was one of Mr. James Girty's three Negroes and "known to be saucy."⁴⁰

³⁹ *Essex Historical Society—Papers and Addresses*, Vol. 1, Windsor, Ont. (1913), pp. 13, 39, 48-52.

This is translated thus: "I certify that I have sold and delivered to Mr. Labadie a Panis slave called Manon for and in consideration of 80 minots (practically 80 bushels) of wheat which he is to pay me as he has it the coming spring—given under my hand at Detroit this 10th day of October, 1775.

WITNESS:

(Signed)

(Signed) JOHN PORTEOUS.

JAMES STERLING."

⁴⁰ The fact was that Jack York had broken into McKee's dwelling house to commit rape and he had committed rape on the person of Mrs. Ruth Sufflemine (or Stufflemine).

Powell's report is dated from Mount Dorchester, September 22, 1800. *Canadian Archives, Sundries U. C. 1792-1800*; Hunter's decision in May is in *Canadian Archives Letters Hunter to Heads of Departments*, p. 65; York's escape is *ibid.*, p. 84; the Death Warrant is referred to in *Canadian Archives Sundries U. C. 1792-1800*.

There were certainly slaves in the Western District. The will of Antoine Louis Descomps Labadie made May 26, 1806, contains a bequest "I also give and bequeath to my wife Charlotte, the use or service of two slaves that she

Another report nearly a score of years later may be of interest. It can be best understood in its historical setting. During the war of 1812, as soon as the American invasion of Canada began, prices of all commodities began to soar.⁴¹ There was a great demand for beef for the troops regular and militia and the commissariat was not too scrupulously particular to inquire the source whence it might come. The result was that a crime which had been almost unknown suddenly increased to alarmingly large proportions. Cattle roaming in the woods were killed and the meat sold to the army. Prosecutions were instituted in many cases. It was found that the perpetrators were generally, but by no means always, landless men, not infrequently refugee slaves, who had come to the province from the United States. The offence was punishable with death;⁴² and convictions were not hard to obtain. But the punishment of death was not in practice actually inflicted.

Whatever the cause, the crime continued until normal conditions were reestablished when it became as rare as it had been before the war. At the Fall Assizes, 1819, at York before Mr. Justice Campbell and a jury, a man of color, Philip Turner, was convicted of stealing and killing a heifer and sentenced to death: Mr. Justice Powell who

may select as long as she continues to be my widow." "A black boy slave to Mrs. Benton, widow of the late Commodore of the Lakes" seems to have been as bad as Jack York. Convicted at Kingston of a house robbery, a capital crime he had the "benefit of clergy" that is, set free as a first offence. But he did not mend his ways. He committed burglary and was convicted at Kingston 1795 before Mr. Justice Powell. The judge sentenced him to be hanged but recommended a pardon. He said the boy was said to be 17 but looked no more than 15 and in view of his education as a slave he hoped that his "would not be the first capital example." *Can. Arch.*, B. 210.

⁴¹ In a memorial by the judges of the Court of King's Bench to the Lieutenant Governor, January 10, 1814, they point out that prices have doubled since the war. The prices before the war and at the time were of bread 1 / and 2 /; of beef 6 d and 1 /; of wood 7 / 6 and 15 /.

⁴² Before 1772, this was not a crime at all but only a civil trespass; the Waltham Black Act (1722) 9 George I, c. 22 made it a felony punishable with death without benefit of clergy. This continued to be the law in England until the Act (1827) 7, 8 George IV, c. 27 (Imp.), and in Upper Canada until 1841.

had been in the Commission of Oyer and Terminer with Campbell reported to the Lieutenant-Governor⁴³ that there had as yet been no execution for this offence in the province and recommended that the sentence should be committed to banishment for life from His Majesty's dominions.⁴⁴ Tradition has it that Turner was a refugee from the United States and begged to be hanged rather than sent back where he would be again enslaved.⁴⁵

When the fugitive slave reached the soil of Upper Canada he became and was free with all the rights and privileges of any other freeman: but sometimes the former condition of servitude had unhappy results. One case will suffice. John Harris was a slave in Virginia. He rented a house in Richmond and lived in it with his wife Sarah Holloway. Harris was a painter and gave the greater part of his earnings to his master. The wife earned money by washing and gave to her mistress part of her scanty earnings. The wife's second name was that of her master Major Holloway in whose house she had been married in 1825 to Harris by the Reverend Richard Vaughan, a Baptist minister, a free man. The couple had three children.

In 1833 Harris effected his escape to Upper Canada and came to Toronto (then York) in the spring of 1834 under the name of George Johnstone. In 1847 he obtained from John Beverley Robinson, Chief Justice of Upper Canada a deed of three acres of land part of Lot 12 in the First Concession from the bay east of the river Don in the Township of York. He died without a will in February, 1851. The deserted wife after his escape married a man by the

⁴³ Sir Peregrine Maitland.

⁴⁴ Banishment existed as a punishment in Upper Canada until 1841, when it was finally abolished and succeeded by imprisonment. Banishment was a very common alternative for hanging. I have counted as many as four cases at one assize.

⁴⁵ The tradition is a floating and rather indefinite one. It has some plausibility but there is nothing which to my mind can be dignified by the name of proof. The facts of the Turner case will be found in a Report by Mr. (afterwards Chief) Justice Powell to Sir Peregrine Maitland's Secretary Edward McMahon, November 1, 1819, *Canadian Archives, Sundries, U. C.*, 1819.

name of Brown. She continued a slave until the fall of Richmond and died in 1869 or 1870.⁴⁶

⁴⁶ *Canadian Archives*, Q. 324, pp. 432, 436 Letter, June 8, 1818, from "Thos. N. Stewart, Capt. H. P. late Royal Newfoundland Regiment" to the Right Honourable Earl Bathurst, dated from Barnstable, North Devon.

Turning to a more pleasant subject, while it may not be strictly within the purview of this treatise, it may be permitted to bring to light from the files of the Canadian Archives a story of a poor black woman who showed true humanity. It may be considered by some at the expense of her patriotism. That will not be admitted by everyone, for what share did the Negro have in America in which he lived more than in Britain which offered him freedom?

When in May, 1813, General Dearborn took Fort George in Upper Canada, one of his prisoners was Captain Thomas N. Stewart of the Royal Newfoundland Regiment who was wounded. Taken to the United States, he was with several other British officers kept for months a close prisoner at Philadelphia as a hostage under the retaliation system.

"At length," said he, "I with fourteen other officers made my escape from the prison at Philadelphia by sawing off the iron bars with the springs of watches, but from the active search which was made ten of my companions were retaken in the course of three days. I . . . attribute my success (as well as that of two more British officers) in being enabled to elude the vigilance of the enemy to the kindness and humanity of a poor black woman to whose protection we committed ourselves in our *real character* and situation: and notwithstanding a reward of one hundred dollars was offered for the apprehension of each officer without our even being able to reward her in an equal degree, she persevered in affording us comfort and accommodation, greatly to her own risk and loss by the total resignation of her small hut and a tender of her services to our use visiting us only at night with provisions, &c. This she continued to do for eight days. When it was thought that the active search was in a great degree abated I ventured by night to leave the abode of this black woman with the intention of going to the Headquarters of the British Army in Canada and this I ultimately succeeded in accomplishing."

His companions leaving one by one at different times also succeeded in returning to the service of their country. Having only \$70 and having to travel 600 miles, Capt. Stewart could give the woman only \$20: and all she received from all the officers was only \$50. He wrote Earl Bathurst, Secretary of State for War and the Colonies asking that she should be remunerated and saying that he would "be most happy to give the address and the source thro' which communication could be made."

Bathurst replied June 13, asking for particulars, and Captain Stewart June 18 wrote again on the eighteenth of June saying that the matter required the utmost circumspection and excusing himself from giving information until he had communication with America, hoping to point out the precise object whom "His Lordship has thought worthy of remuneration." No doubt the matter then passed into the Secret Service, as no further correspondence is preserved in documents open to the public.

Canadian Archives, Q 324, pp. 432, 436.

About that time the eldest son came to Canada, and he brought an action as the heir-at-law against one Cooper, the person in possession.⁴⁷ All the facts were clear and the only difficulty in the way was as to the validity of the marriage of the Negro. Chief Justice William Buell Richards, of the Court of Queen's Bench tried the case at the Fall Assizes, 1870, at Toronto. Evidence was given by a Virginia lawyer and judge that there was no law in Virginia either authorizing or forbidding the marriage of slaves because "slaves were property and not persons for marital purposes. . . . In short, by the law of Virginia, slaves were but property, treated as property exclusively, except where by special Statute they were made persons."⁴⁸

On this evidence, therefore, the Chief Justice dismissed the action. The plaintiff appealed to the full Court of Queen's Bench⁴⁹ urging that the slaves had done all they could to make their marriage legal. In vain, they were not British subjects and the rules of international law were too rigid to allow of the court holding the marriage legal. Mr. Justice Wilson in giving the judgment of the Court said:

"This is, no doubt, an unfortunate conclusion, for the plaintiff is undoubtedly the child of John Harris and Sarah

⁴⁷ Two years after her first husband's death, that is, in 1853, the widow who had then married one Scott sold the lot to Mr. Boomer for \$300. Mr. Boomer sold two acres to Edward Osborne and he to Cooper for \$800. By 1871 the land had appreciated in value so as to make it worth a lawsuit. Of course, the widow never had any right to sell the land, but it was at least ungracious for her son to repudiate her deed.

⁴⁸ The law of Virginia as to marriages of slaves even with the consent of the master was fully and clearly stated by the Court of Appeals of Virginia in the case of *Scott v. Raub* (1872) 88 Virginia, 721. See also the decision of the Supreme Court of the United States in the case of *Hall v. United States*, 92 U. S. 127; and in Alabama, *Matilda v. Gardner*, 24 Alabama, 719.

⁴⁹ The motion was heard in Trinity Term, 34 Victoriae i.e. in February, 1871; see the report in 31 Upper Canada Queen's Bench Reports, p. 182: *Harris v. Cooper*. The Court was composed of the Chief Justice William Buell Richards, afterward Sir William Buell Richards, Chief Justice of Canada, Mr. Justice Joseph Curran Morrison, afterwards a Judge of the Court of Error and Appeal, and Mr. Justice Adam Wilson, afterwards successively Chief Justice of the Court of Common Pleas, and of the Court of Queen's Bench.

who were made man and wife in form and by all the usual solemnities of real matrimony. The parents were of mature age, of sound sense, reason and understanding. The father had a trade which he followed by permission of his master for a yearly sum which he paid to him for the privilege, or as it is said 'he hired his own time.' He rented a house for himself; he was married with the consent of those who could give it by a minister in orders and in form at least under the sanction of religion: he lived with the woman he had taken as his wife and had children by her and left her only to gain his freedom; yet it is manifest by the force of positive human law, there was no marriage and no legitimate issue.'⁵⁰

⁵⁰ 31 Upper Canada Queen's Bench Reports at p. 195, 1871.

CHAPTER VI

THE FUGITIVE SLAVE IN UPPER CANADA

Before the Act of 1793, there was some immigration of slaves fleeing from their masters in the United States. After the Act of 1793, however, a slave by entering Upper Canada became free, whether he was brought in by his master or fled from him. Legislation of the United States in the same year¹ increased the number of those fleeing to the province under this law. Slaves who had effected their escape to what were considered free States were liable to be reclaimed by their masters. Shocking instances of the forcing into renewed slavery of the escaped slave and even of enslaving free persons of color are on record and there are told worse which never saw the open light of day.

¹ The first Fugitive Slave Law was passed by the United States in 1793. Three years afterwards occurred an episode, little known and less commented upon, showing very clearly the views of George Washington on the subject of fugitive slaves, at least of those slaves who were his own.

A slave girl of his escaped and made her way to Portsmouth, N. H.; Washington on discovering her place of refuge, wrote concerning her to Joseph Whipple the Collector at Portsmouth, November 28, 1796. The letter is still extant. It is of three full pages and was sold in London in 1877 for ten guineas. (*Magazine of American History*, Vol. 1, December, 1877, p. 759.) Charles Sumner had it in his hands when he made the speech reported in Charles Sumner's *Works*, Vol. III, p. 177. Washington in the letter described the fugitive and particularly expressed the desire of "her mistress" Mrs. Washington for her return to Alexandria. He feared public opinion in New Hampshire for he added:—

"I do not mean by this request that such violent measure should be used as would excite a mob or riot which might be the case if she has adherents; or even uneasy sensations in the minds of well disposed citizens. Rather than either of these should happen, I would forego her services altogether and the example also which is of infinite more importance."

In other words if the slave girl has no friends or "adherents," send her back to slavery—if she has and they would actively oppose her return, let her go—and even if it only be that "well-disposed citizens" disapprove of her capture and return, let her remain free.

Eli Whitney's invention of the cotton gin about the same time² made slaves much more valuable and not only checked the movement toward gradual emancipation but increased the ardor with which the fugitive was pursued. From 1793 the influx of fugitive slaves into the province never quite ceased. The War of 1812 saw former slaves in the Canadian militia fighting against their former masters and Canada as an asylum of freedom became known in the South by mysterious but effective means. "As early as 1815 negroes were reported crossing the Western Reserve to Canada in great numbers and one group of Underground Railway workers in Southern Ohio is stated to have passed on more than 1000 fugitives before 1817."³

It is not proposed here to give an account of the celebrated Underground Railway. It is sufficient to say that it was the cause of hundreds of slaves reaching the province.⁴ Some slaves escaped by their own efforts in what can fairly be called a miraculous way. No more dramatic or thrilling tales were ever told than could be told by some of these refugees. Some having been brought by their masters near to the Canadian boundary then clandestinely or by force effected a passage. Some came from far to the South, guided by the North Star. Many were assisted by friends more or less secretly. These refugees joined

² Whitney's first patent was 1784. His rights were firmly established in 1807.

³ Landon, *Canada's Part in Freeing the Slave*, Ontario Historical Society. Papers, etc. (1919), quoting Birney's *James G. Birney and His Times*, p. 435.

Mr. Landon's paper is of great interest and value and I gladly avail myself of the permission to use it.

⁴ A fairly good account of the Underground Railway will be found in William Still's *Underground Railroad*, Philadelphia, 1872, in W. H. Mitchell's *Underground Railway*, London, 1860; in W. H. Siebert's *Underground Railway*, New York, 1899, and in a number of other works on Slavery. Considerable space is given the subject in most works on Slavery.

One branch of it ran from a point on the Ohio River, through Ohio and Michigan to Detroit; but there were many divagations, many termini, many stations; Oberlin was one of these. See Dr. A. M. Ross, *Memoirs of a Reformer*, Toronto, 1893, and *Mich. Hist. Coll.*, XVII, p. 248.

settlements with other people of color freeborn or freed in the western part of the Peninsula, in the counties of Essex and Kent and elsewhere.⁵ Some of them settled in other parts of the province, either together or more usually sporadically. Toronto received many. These were superior to most of their race, for none but those with more than ordinary qualities could reach Canada.⁶

The masters of runaway slaves did not always remain quiet when their slaves reached this province. Sometimes they followed them in an attempt to take them back. There are said to have been a few instances of actual kidnapping. There were some of attempted kidnapping. Most of these are merely traditional but at least one is well authenticated.⁷

In May, 1830, a young man with finely chiselled features, bright hazel eyes, apparently a quadroon or octoroon applied for service at the house of Charles Baby, "the old Baby mansion in the . . . historical town of Sandwich" in Upper Canada on the Detroit River. He said he had escaped from slavery in Kentucky, had arrived on the previous evening at Detroit and had crossed the river to Canada as quickly as possible. He had been a mason but understood gardening and attending to horses and had other accomplishments. He was engaged and proved a

⁵ The Buxton Mission in the County of Kent is well known. The Wilberforce Colony in the County of Middlesex was founded by free Negroes but they had in mind to furnish homes for future refugees. See Mr. Fred Landon's account of this settlement in the recent (1918) *Transactions of the London and Middlesex Hist. Soc.*, pp. 30-44. For an earlier account see A. Steward's *Twenty Years a Slave* (Rochester, N. Y., 1857).

⁶ "The Kingdom of Heaven suffereth violence and the violent take it by force." There can be no doubt that the Southern Negro looked upon Canada as a paradise. I have heard a colored clergyman of high standing say that of his own personal knowledge dying slaves in the South not infrequently expressed a hope to meet their friends in Canada.

⁷ *Souvenirs of the Past*, by William Lewis Baby, Windsor, Ontario, 1896. Mr. Baby is a member of an old French-Canadian family of the highest repute for honor and public service. Charles Baby was the author's brother. The author lived with him and tells the story of his own knowledge. The quotations are from Mr. Baby's book.

satisfactory servant "respectful, cleanly, capable, lithe and active as a panther." His former master came from Kentucky and reclaimed him after the lapse of six months. The recognition was mutual and immediate. The Kentuckian, offered \$2000 to Baby for the return of Andrew his former slave, but the offer was indignantly refused. It turned out that Andrew had taken his master's favorite horse to assist him in his flight but had turned it loose after riding it some twenty-five miles. Whether for this reason or for some other, the Kentuckian did not appeal for the extradition of Andrew⁸ but determined to use violence.

A short time afterwards five desperadoes from Detroit attempted to kidnap Andrew while the family were at Church, but they were successfully resisted by Andrew and Charles Baby until the service was over and the people were seen hastening home. The would-be kidnappers made their escape across the river. Finding it dangerous to keep Andrew so near the border, the neighbors took up a subscription and he was sent by stage to York (Toronto). This place he reached in safety. "He made good" and lived a respectable and useful life undisturbed by any fear of Kentucky vengeance.⁹

The law as to such attempts was authoritatively stated in 1819 by John Beverley Robinson, Attorney General of Upper Canada, afterwards Sir John Beverley Robinson, Bart., Chief Justice of Upper Canada. The opinion will be given in his own words:¹⁰

"In obedience to Your Excellency's comments I have perused the accompanying letter from G. C. Antrobus Esquire. His Majesty's charge d' affaires at the Court of Washington and have attentively considered the question referred to me by Your Excellency thereupon—namely—"Whether the owners of several Negro Slaves who have fled from the United States of America and are now resident in this Province can be permitted to come hither and

⁸ As was done in the case of Solomon Mosely, spoken of *infra*, p. 85.

⁹ I have not been able to verify other tales of attempted abduction to my satisfaction; there are, however, several stories which may be true.

¹⁰ *Canadian Archives Sundries, U. C.*, 1819.

obtain possession of their property, and whether restitution of such Negroes can be made by the interposition of the government of this Province'' and I beg to express most respectfully my opinion to your Excellency that the Legislature of this Province having adopted the Law of England as the rule of decision in all questions relative to property and civil rights, and freedom of the person being the most important civil right protected by those laws, it follows that whatever may have been the condition of these Negroes in the Country to which they formerly belonged, here they are free—For the enjoyment of all civil rights consequent to a mere residence in the country and among them the right to personal freedom as acknowledged and protected by the Laws of England in cases similar to that under consideration, must notwithstanding any legislative enactment that may be thought to affect it, with which I am acquainted, be extended to these Negroes as well as to all others under His Majesty's Government in this Province. The consequence is that should any attempt be made by any person to infringe upon this right in the persons of these Negroes, they would most probably call for, and could compel the interference of those to whom the administration of our Laws is committed and I submit with the greatest deference to Your Excellency that it would not be in the power of the Executive Government in any manner to restrain or direct the Courts or Judges in the exercise of their duty upon such an application.''¹¹

Then came a number of applications for the return of runaway slaves cloaked under criminal charges, the pretence being made that they had committed some crime and that it was desired to bring them to trial and punishment. There can be no doubt that in the absence of some constitutional provision every country has the right to keep out criminals and, if they have entered the country, to hand them over to the authorities of the country whence they came; but the rules of international law have never gone so far as to make it obligatory on any country to send away immigrant criminals even if demanded by their former country. It has always been the theory in Upper Canada that the Governor had the power independently of statute

¹¹ John Beverley Robinson was the son of Christopher Robinson mentioned above.

or treaty to deliver up alien refugees charged with crimes.¹² This was not wholly satisfactory and the legislature took the matter up and passed an act governing such cases, February 13th, 1833,¹³ providing for the apprehension of fugitive offenders from foreign countries, and delivering them up to justice. This provides that on the requisition of the executive of any foreign country the governor of the province on the advice of his executive council may deliver up any person in the province charged with "Murder, Forgery, Larceny or other crime which if committed within the province would have been punishable with death, corporal punishment, the pillory, whipping or confinement at hard labour." The person charged might be arrested and detained for inquiry, but the act was permissive only and the delivery up was at the discretion of the Governor-in-Council.

It was under this act that the extradition of Thornton Blackburn was sought but finally refused. The case was this: Two persons of color named Blackburn, a man and his wife, were claimed as slaves on behalf of some person in the State of Kentucky. They were arrested in Detroit in 1833 and examined before a magistrate, who, in accordance with the law of the United States, made his certificate and directed them to be delivered over as the personal property of the claimant in Kentucky. The sheriff took them into custody but when one of them was on the point

¹² The same rule obtained in Lower Canada; (1827) re Joseph Fisher, 1 Stuart's L. C. Rep. 245.

¹³ This is the Act (1833), 3 Will IV, c. 7 (U. C.). This statute came forward as cap. 96 in the *Consolidated Statutes of Upper Canada*, 1859, but was repealed by an Act of (United) Canada (1860), 23 Vic. c. 91 (Can.).

The Act of 1833 was drawn by Chief Justice Robinson and introduced by him into the Legislative Council of which he was Speaker—it was a "Government measure." Notice of bringing in the bill was given November 28, 1832; the bill brought in November 30; read the second time December 3 passed the committee of the whole on the fourth of December and was finally passed by the Council the following day. It reached the Legislative Assembly the same day where it was passed without opposition and received the Royal Assent February 13, 1833.

of being removed from the prison to be restored to his owner, he was violently rescued and directed across the river into Canada. On the day before the rescue of Thornton Blackburn his wife eluded the jailer in disguise and escaped to Canada.

The Upper Canadian Government was, therefore, called upon to return these prisoners to the United States. Upon examining the record in the case, however, the Attorney General of Upper Canada in reply to the Governor for information in the case, advised that the so-called offences of Thornton Blackburn in trying to effect his own escape from persons seeking to return him to slavery could not be construed as rioting or rescuing a prisoner from an officer of the law as had been set forth in the requisition papers from the Michigan authorities and certainly could not be applied to Thornton Blackburn's wife who, as the evidence showed, had taken no part at all in the rescue.

The council¹⁴ was thereafter called upon to consider the question whether, if a similar charge had been committed in Canada, the offenders would be liable to undergo any of the punishments provided for in the act passed at the session of the Canadian Legislature in 1833. The Attorney General¹⁵ was of the opinion that had the Governor been confined to the official requisition that had accompanied it, he might have been warranted in delivering up these persons inasmuch as there was evidence on which, according to the terms of the Canadian law, a magistrate would have been warranted in apprehending and committing for

¹⁴ At the meeting were present His Excellency Sir John Colborne, K. C. B. Lieutenant Governor, the Hon. and Rev. John Strachan, D.D., Archdeacon of York, the Honorable Peter Robinson, the Honorable George Herchmer Markland, the Honorable Joseph Fells, and the Honorable John Elmsley. The Executive Council at that time was very much under the influence of the Chief Justice and Dr. Strachan, then Archdeacon afterwards the first Anglican Bishop of York or Toronto.

¹⁵ Robert Sympson Jameson an English barrister of the Middle Temple, a familiar friend of Coleridge and Southey and the husband of Anna Jameson of some literary note.

The report is from the *Canadian Archives, State J.*, p. 137.

trial persons charged with riot, forcible rescue and assault and battery. The Attorney General believed, however, that the Governor and the Council were not confined to such evidence since, though limited in their authority to enforcing the provisions of the act against fugitives from foreign States, on being satisfied that the evidence would warrant the commitment for trial, yet in coming to that conclusion, they were bound to hear not *ex parte* evidence alone but matter explanatory to guide their judgment; for even with the authority so to do, they were not required to deliver up any prisoner so charged, if for any reason they deemed it inexpedient so to do.

The conclusion of the Attorney General, therefore, was that Blackburn and his wife were not charged with any of the offences enumerated in the statute of Canada and that the Governor and Council were not authorized by its provisions to send them out of the province. He said, moreover: "It has not escaped our attention as a peculiar feature in this case that two of the persons whom the Government of this Province is requested to deliver up are persons recognized by the Government of Michigan as slaves and that it appears upon these documents that if they should be delivered up they would by the laws of the United States be exposed to be forced into a state of slavery from which they had escaped two years ago when they fled from Kentucky to Detroit; that if they should be sent to Michigan and upon trial be convicted of the riot and punished they would after undergoing their punishment be subject to be taken by their masters and continued in a state of slavery for life, and that, on the other hand, if they should never be prosecuted, or if they should be tried and acquitted, this consequence would equally follow."

The next case was not so happy in its result. It caused much excitement at the time and is not yet forgotten. Solomon Mosely or Moseby, a Negro slave, came to the province across the Niagara River from Buffalo which he had reached after many days travel from Louisville, Ken-

tucky. His master followed him and charged him with the larceny of a horse which the slave took to assist him in his flight. That he had taken the horse there was no doubt and as little that after days of hard riding he had sold it. The Negro was arrested and placed in the Niagara Gaol. A *prima facie* case was made out and an order sent for his extradition.¹⁶

¹⁶ The Executive Council on September 7th 1837 recommended his extradition. The following is a copy of the Proceedings:

EXECUTIVE COUNCIL CHAMBER AT TORONTO Thursday 7th September 1837

REQUISITION FOR SOLOMON MOSELY

Read the Requisition of the Governor of the State of Kentucky and other documents relating to the surrender of Solomon Mosely a fugitive from the State of Kentucky charged with Horse stealing.

Read also the Attorney General opinion thereon as follows:

ATTORNEY GENERAL'S OFFICE

TORONTO 6th September 1837

Sir,

I have the honor to report that in my opinion there is sufficient proof of the guilt of Solomon alias John Mosely a fugitive from the State of Kentucky charged with horse stealing in that Country—to Warrant His Excellency the Lieutenant Governor (with the advice of the Executive Council) to deliver him up upon the request made by the Governor of the State referred to.

I have the honor to be &c

(Signed) CS HAGERMAN, *Atty, Gen*

J JOSEPH ESQ,

Civil Secretary.

The Council concur in the above opinion of the Attorney General and consider that the case comes within 3rd Wm 4 Ch 7 and therefore advise His Excellency the Lieutenant Governor to deliver up the Fugitive alluded to in the requisition of His Excellency the Governor of the State of Kentucky.

—*Can. Arch. State J. Upper Canada*, p. 595.

In a despatch from Head to Lord Glenelg, October 8, 1837, *Can. Arch. Q. 398*, p. 149, Head says: "In a case brought before me only a few days previous to that which is the subject of this communication (*i.e.*, the Jesse Happy case) I insisted on giving up to the Governor of the Commonwealth of Kentucky (a slave) who in order to effect his escape had been guilty of stealing his Master's horse. It was suggested that the real object was to get him back to his Master—not to punish him for the crime. But the crime was perfectly proved and the Council followed the judicial opinion in the Thornton Blackburn case that as the black had been shown to have committed an offence clearly coming within the statute of 1833, they could not advise a course to be taken different from that which should be pursued with respect to free white persons under the same circumstances." They, therefore, advised an order for extradition.

The people of color of the Niagara region made the Mosely case their own and determined to prevent his delivery up to the American authorities to be taken to the land of the free and the home of the brave, knowing that there for him to be brave meant torture and death, and that death alone could set him free. Under the leadership of Herbert Holmes, a yellow man¹⁷ a teacher and preacher, they lay around the jail night and day to the number of from two to four hundred to prevent the prisoner's delivery up. At length the deputy sheriff with a military guard brought out the unfortunate man shackled to a wagon from the jail yard, to go to the ferry across the Niagara River. Holmes and a man of color named Green grabbed the lines. Deputy Sheriff McLeod gave the order to fire and charge. One soldier shot Holmes dead and another bayoneted Green, so that he died almost at once. Mosely, who was very athletic leaped from the wagon and made his escape. He went to Montreal and afterward to England, finally returning to Niagara, where he was joined by his wife, who also escaped from slavery.

An inquest was held on the bodies of Holmes and Green. The jury found "justifiable homicide" in the case of Holmes. "Whether justifiable or unjustifiable" there was not sufficient evidence before the jury to decide in the case of Green. The verdict in the case of Holmes was the only possible verdict on the admitted facts. Holmes was forcibly resisting an officer of the law in executing a legal order of the proper authority. In the case of Green the doubt arose from the uncertainty whether he was bayoneted while resisting the officer or after Mosely had made his escape. The evidence was conflicting and the fact has never been made quite clear. No proceedings were taken against the deputy sheriff; but a score or more of the people of color were arrested and placed in prison for a

¹⁷ To his people he seems to have been known as "Hubbard Holmes"; he is always called a "yellow man," whether mulatto, quadroon, octoroon or other does not appear.

time. The troublous times of the Mackenzie Rebellion came on and the men of color were released, many of them joining a Negro militia company which took part in protecting the border.

The affair attracted much attention in the province and opinions differed. While there were exceptions on both sides, it may fairly be said that the conservative and government element reprobated the conduct of the blacks in the strongest terms, being as little fond of mob law as of slavery, and that the radicals including the followers of Mackenzie, looked upon Holmes and Green as martyrs in the cause of liberty. That Holmes and Green and their followers violated the law there is no doubt; but so did Oliver Cromwell, George Washington and John Brown. Every one must decide for himself whether the occasion justified in the courts of Heaven an act which must needs be condemned in the courts of earth.¹⁸

It was, however, only when the alleged crime was recent and followed up promptly that the rigid rule of extraditing slaves accused of crime was applied. A case which came before the Executive Council a few days after Mosely's is a good illustration of the care taken in such cases. Jesse Happy, a slave in Kentucky, had made his escape to Canada, stealing a horse with which he outran his pursuers. Knowing the indisposition of the Canadian authorities to return fugitives from slavery, the Governor of Kentucky undertook to have this fugitive extradited on the ground that he was charged with a felony in that commonwealth. It appeared that the real object of the application from Kentucky was not so much to bring Happy to trial for the alleged felony as to reduce him again to a state of slavery. In the report of the Attorney General reference was made to an application for extradition in a case in

¹⁸ The contemporary accounts of this transaction, *e.g.*, in the *Christian Guardian* of Toronto, and the *Niagara Chronicle*, are not wholly consistent. The main facts are clear; although there is some doubt as to the time, the military guard were ordered to fire.

which the offence had been recently committed, and because of this fact the requisition was honored. In the case of Jesse Happy, however, the alleged offence had been committed four years prior to making an effort to have him extradited. No process had been issued in the State of Kentucky nor had any steps been taken to punish him for felony. It was suggested, therefore, that the real object of this apprehension was to give him up to his former owners and to deprive him of the personal liberty secured to him by the laws of Canada.

As the delivery of the slave under these circumstances would subject him to a double penalty, the one of being punished for the crime and the other of being returned to a state of slavery even if he should be acquitted, the Canadian authorities were in a dilemma; for punishment of the felony was in strict accordance with the statutes of Canada whereas the enslavement of the fugitive was in direct opposition to the genius of its institutions and the spirit of its laws. Yet as the council¹⁹ could not take the position that because a man happened to be a fugitive slave he should escape the consequences of crime committed in a foreign country to which a free man would be amenable, action was suspended so as to give the accused time to furnish affidavits of the facts set forth in the petition on his behalf, and not wishing to make of this a precedent without the support of the highest authority, the matter was submitted to the Government in England with a request for their views upon this case as a matter of general policy.²⁰

Lord Palmerston having had the matter brought to his attention by Lord Glenelg, Secretary of State for War and the Colonies, recognized its very great importance. He accordingly had it submitted to the Law Officers of the Crown.

¹⁹ Present, Allen, Hon. Augustus Baldwin and Hon. William Henry Draper (afterwards Chief Justice of the Court of Common Pleas, 1856, Chief Justice of the Province of Upper Canada, 1863, and President of the Court of Error and Appeal 1868 till his death, 1877).

²⁰ *Canadian Archives State J.*, p. 597.

The opinion of these officers Sir John Campbell and Sir Robert Mowsey Rolfe appears from a letter from W. T. H. Fox Strangeways, Parliamentary Secretary of State for Foreign Affairs addressed February 25, 1838, to Sir George Gray of the Colonial Department. This officer said:

"I have received and laid before Viscount Palmerston your Letter to me of the 6 December 1837 with its accompanying copy of a Dispatch from Sir Francis Head, in which that officer requests Instructions for his guidance, in the general case of Fugitive Slaves who, having escaped to Canada may be demanded from the Canadian Authorities by the Authorities of the United States on the plea of their having committed crimes in the last mentioned Country and in the particular case of Jesse Happy, who having escaped to Upper Canada more than four years ago, had been demanded from the Lieut. Governor of that Province, upon the ground of a charge of Horse Stealing.

"These two questions have by direction of Lord Palmerston been submitted to the Law Officers of the Crown, and I am directed by his Lordship to state to you the opinion of these officers for the information of Lord Glenelg.

"The Law Officers report upon the general question, that they think that no distinction should in the case contemplated, be made between the demand for Slaves or for Freemen.

"It is the opinion of the Law Officers that in every case in which there is such Evidence of criminality as, according to the terms of the Canadian Statutes, would warrant the apprehension of the accused Party, if the alleged offence had been committed in Canada, then on the requisition of the Governor of the Foreign State, the accused Party ought to be delivered up, without reference to the question as to whether he is or is not a Slave.

"The Law Officers desire however that it should be dis-

tinctly understood, that the Evidence for this Purpose must be evidence taken in Canada, upon which (if false) the Parties making it may be indicted for Perjury.

"The Law Officers remark further on this point that the 3rd Section of the Provincial Statute enables the Governor to refuse to deliver up a Party, whenever special circumstances may render it inexpedient to accede to the demand made to the Governor on such a point.

"The Law Officers, reporting upon the subject of Jesse Happy state that they do not think that there was in that case such evidence of criminality, as, according to the Laws of the Province of Upper Canada would warrant the apprehension of Jesse Happy if the offence charged had been committed in U. Canada.

"The Law Officers indeed go farther, and say that so far as there is any evidence of the Facts, what took place was not Horse Stealing according to the Laws of Upper Canada, but merely an unauthorized use of a horse, without any intention of appropriating it.

"The Law Officers conclude by stating, that upon these grounds, they are of opinion, that Jesse Happy ought to be set at liberty, and that instructions to that effect should be sent to the Lieutenant Governor of Upper Canada."²¹

On the ninth of May Glenelg wrote to Sir George Arthur who succeeded Bond Head as Lieutenant Governor of Upper Canada, saying: "With reference to my Dispatch to Sir Francis Bond Head of the 4th December last No 255, I enclose for your information the copy of a letter from the Under Secretary of State for Foreign Affairs stating the substance of the opinion given by the Law Officers of the Crown in respect to the restitution of Fugitive Slaves who may be demanded from the Government of Upper Canada

²¹ *Canadian Archives*, G. 84, p. 277. The letter to Sir George Arthur is *ibid.*, G. 84, p. 275. The despatch from Lord Glenelg to Sir Francis Bond Head dated January 4, 1837, has endorsed on it a pencil memorandum "Jesse Happy has been liberated by Lieutenant Governor's command November 14, 1837," *ibid.*, G. 83, p. 238.

on the plea of their having committed crimes at the places from which they have fled. In conformity with the opinion of the Law Officers of the Crown I have to desire that Jesse Happy, the individual with respect to whom this question was raised shall be forthwith set at liberty."

It is impossible not to see that the very stringent rules laid down by the Law Officers of the Crown at Westminster were intended to be *in favorem libertatis*. Happy was released November 14th, 1837, and so far as appears from the official records no further application was ever made for the extradition of a runaway slave until after 1842. That year the well-known Ashburton Treaty was concluded²² between Britain and the United States. This by Article X provides that "the United States and Her Britannic Majesty shall, upon mutual requisitions . . . deliver up to justice all persons . . . charged with murder, or assault with intent to commit murder, or piracy or arson or robbery or forgery or the utterance of forged paper. . . ." Power was given to judges and other magistrates to issue warrants of arrest, to hear evidence and if "the evidence be deemed sufficient . . . it shall be the duty of the . . . judge or magistrate to certify the same to the proper executive authority that a warrant may issue for the surrender of such fugitive."

It will be seen that this treaty made two important changes so far as the United States was concerned. It made it the duty of the executive to order extradition in a proper case and took away the discretion. It gave the courts jurisdiction to determine whether a case was made out for extradition.²³ These changes made it more difficult

²² Concluded at Washington, August 9, 1842.

²³ It was held in the Province of Upper Canada that the Act of 1833 was superseded by the Ashburton Treaty in respect to the United States, but that it remained in force with respect to other countries (*Reg. v. Tubber*, 1854, 1, P. R. 98). Since the treaty our government has refused to extradite where the offence charged is not included in the treaty. In *re Laverne Beebe* (1863), 3 P. R. 273—a case of burglary. The provisions of the treaty were brought into full effect in Canada (Upper and Lower) by the Canadian Statute of 1849, 12, Vic. c. 19; C. S. C. (1859), c. 89.

in many instances for a refugee to escape; but the courts were astute as ever in finding reasons against the return of slaves.

The case of John Anderson is a well-known one in evidence. He was born a slave in Missouri. As his master was Moses Burton, he was known as Jack Burton. He married a slave woman in Howard County, the property of one Brown. In 1853, Burton sold him to one McDonald living some thirty miles away and his new master took him to his plantation. In September 1853 he was seen near the farm of Brown, when apparently he was visiting his wife. A neighbor, Seneca T. P. Diggs, became suspicious of him and questioned him. As his answers were not satisfactory he ordered his four Negro slaves to seize him, according to the law in the State of Missouri. The Negro fled, pursued by Diggs and his slaves. In his attempt to escape the fugitive stabbed Diggs in the breast and Diggs died in a few hours. Effecting his escape to this province, he was in 1860 apprehended in Brant County, where he had been living under the name of John Anderson, and three local justices of the peace committed him under the Ashburton Treaty. A writ of habeas corpus was granted by the Court of Queen's Bench at Toronto, under which the prisoner was brought before the Court of Michaelmas Term of 1860.

The motion was heard by the full court.²⁴ Much of the argument was on the facts and on the law apart from the form of the papers, but that was hopeless from the beginning. The law and the facts were too clear, although Mr. Justice McLean thought the evidence defective. The case turned on the form of the information and warrant, a somewhat technical and refined point. The Chief Justice Sir John Beverley Robinson, and Mr. Justice Burns agreed that the warrant was not strictly correct, but that it could be amended. Mr. Justice McLean thought it could not and should not be amended.

²⁴ The Chief Justice Sir John Beverley Robinson, Mr. Justice McLean (afterwards Chief Justice of Upper Canada) and Mr. Justice Burns.

The case attracted great attention throughout the province, especially among the Negro population. On the day on which judgment was to be delivered, a large number of people of color with some whites assembled in front of Osgoode Hall.²⁵ While the adverse decision was announced, there were some mutterings of violence but the counsel for the prisoner²⁶ addressed them seriously and impressively, reminding them "It is the law and we must obey it." The melancholy gathering melted away one by one in sadness and despair.

Anderson was recommitted to the Brantford Jail.²⁷ The case came to the knowledge of many in England. It was taken up by the British and Foreign Anti-Slavery Society and many persons of more or less note. An application was made to the Court of Queen's Bench of England for a writ of habeas corpus, notwithstanding the Upper Canadian decision, and while Anderson was in jail at Toronto, the court after anxious deliberation granted the writ²⁸ but it became unnecessary owing to further proceedings in Upper Canada.

²⁵ The seat of the Superior Courts in Toronto, the Palais de Justice of the Province.

²⁶ Mr. Samuel B. Freeman Q. C., of Hamilton, a man of much natural eloquence, considerable knowledge of law and more of human nature; he was always ready and willing to take up the cause of one unjustly accused and was singularly successful in his defences. I have heard it said that it was Mr. M. C. Cameron, Q. C., who so addressed the gathering but he does not seem to have been concerned in the case in the Queen's Bench.

²⁷ The case is reported in (1860) 20 U. Can. Q. B., pp. 124-123. The warrant is given at pp. 192, 193.

²⁸ The case is reported in (1861) 3 Ellis & Ellis Reports, Queen's Bench, p. 487; 30, Law Jour., Q. B., p. 129; 7 Jurist N. S., p. 122; 3 Law Times, N. S., p. 622; 9 Weekly Rep., p. 255.

It was owing to this decision that the statute was passed at Westminster (1862) 25, 26, Vic. c. 20, which by sec. 1 forbids the courts in England to issue a writ of habeas corpus into any British possession which has a court with the power to issue such writ. The Court was Lord Chief Justice Cockburn and Justices Crompton, Hill and Blackburn, a very strong court. The Counsel for Anderson was the celebrated but ill-fated Edwin James. The writ was specially directed to the sheriff at Toronto, the sheriff at Brantford and the jail keeper at Brantford. Judgment was given January 15, 1861.

In those days the decision of any Court or of any judge in habeas corpus proceedings was not final. An applicant might go from judge to judge, court to court²⁹ and the last applied to might grant the relief refused by all those previously applied to. A writ of habeas corpus was taken out from the other Common Law Court in Upper Canada, the Court of Common Pleas. This was argued in Hilary Term, 1861, and the court unanimously decided that the warrant of commitment was bad and that the court could not remand the prisoner to have it amended.³⁰ The prisoner was discharged. No other attempts were made to extradite him or any other escaped slave; and Lincoln's Emancipation Proclamation put an end to any chance of such an attempt being ever repeated.³¹

²⁹ Common Law of course, not Chancery.

³⁰ The court was composed of Chief Justice William Henry Draper, C. B., Mr. Justice Richards, afterwards Chief Justice successively of the Court of Common Pleas, of the Court of Queen's Bench and of the Supreme Court of Canada and Mr. Justice Hagarty, afterwards Chief Justice successively of the Court of Common Pleas, of the Court of King's Bench, and of Ontario.

Mr. Freeman was assisted in this argument by Mr. M. C. Cameron, a lawyer of the highest standing professionally and otherwise, afterwards Justice of the Court of Queen's Bench and afterwards Counsel for the Crown on both arguments were Mr. Eccles, Q. C., a man of deservedly high reputation, and Robert Alexander Harrison, afterwards Chief Justice of the Court of Queen's Bench, an exceedingly learned and accurate lawyer.

The case in the Court of Common Pleas is reported in Vol. 11. Upper Can., C. P., pp. 1 sqq.

³¹ *Canadian Archives, Sundries U. C.*, 1807.

It would be unfair to the United States to say or suggest that all the flights for freedom were in the one direction. Very early, trouble was experienced by Canadian owners of slaves from their running away to the United States. The following letter tells its own story. D. M. Erskine the British representative writing from New York, May 26, 1807, to Francis Gore, Lieutenant Governor of Upper Canada, says:

"I have the honour to acknowledge the receipt of your letter of the 24th ult enclosing a Memorial presented to you by the Proprietors of Slaves in the Western District of the Province of Upper Canada.

"I regret equally with yourself the Inconvenience which His Majesty's subjects in Upper Canada experience from the Desertion of their slaves into the Territory of the United States, and of Persons bound to them for a term of years, as also of his Majesty's soldiers and sailors; but I fear no Representation to the Government of the United States will at present avail in

checking the evils complained of, as I have frequently of late had occasion to apply to them for the Surrender of various Deserters under different circumstances and always without success.

"The answer that has been usually given, has been, 'That the Treaty between Great Britain & the United States which alone gave them the Power to surrender Deserters having expired, it was impossible for them to exercise such an authority without the Sanction of the Laws.'

"I will however forward to His Majesty's Minister for Foreign Affairs the Memorial above mentioned in the Hope that some arrangements may be entered into to obviate in future the great Losses which are therein described."

In the *Life and Adventures of Wilson Benson, written by himself* (Toronto, 1876), is found the following, pp. 34-36:

"In 1849 I shipped on the schooner *Rose of Milton*, Capt. Hamilton, cruising on Lakes Ontario and Erie. In one trip to the town of Erie, Pennsylvania, for a cargo of coal, while lying at the dock, a diminutive negro man, with a white beard, came on board the vessel, and inquired of me if this was a British vessel. On being informed that it was, he desired to be secreted, stating that he was a runaway slave, and that his pursuers were on his track. I at once secreted him in a closet which served as a store-room for vegetables, &c., and as we were almost ready to set sail, I did not discover his presence to either Captain or crew until we were some distance out on the lake. When he appeared, Capt. Hamilton inquired of me where I had obtained 'that child,' and on being informed, expressed some anxiety, as we were liable to be captured had we been followed by a steamer. As it was, he merely looked up at the rigging, and exclaimed, 'Blow, breezes, blow!' The negro, who knew no other name than 'Sambo' we brought to Toronto. On one occasion, when I offered him some molasses, he shook his head and made grimaces expressive of disgust. He informed me that the slaves employed on the sugar plantations, when beaten by their masters, in order to obtain an indirect revenge, spat in the syrup, and committed other filthy things as an imaginary punishment upon the whites. I frequently saw Sambo in Toronto, and many times he expressed thankfulness to me for his deliverance. I may here mention that shortly after the arrival of Sambo on board the *Rose of Milton* at Erie, two suspicious-looking men, dressed in plain clothes, came aboard and paced up and down the deck several times, and as all the crew were absent at the time, I felt some apprehension for the safety of the poor fugitive; but seeing nothing of a suspicious appearance, and the almost entire absence of the crew, they sauntered away. I made several other trips up and down the lakes during that summer on the same vessel."

CHAPTER VII

SLAVERY IN THE MARITIME PROVINCES

The French population of the territory by the sea, the Acadians, are described by the poet as:

Men whose lives glided on like rivers that water the woodlands,
Darkened by shadows of earth, but reflecting an image of heaven.

History does not bear out this idyll; but whatever their faults, at least the Acadians had the negative virtue of possessing no slaves,¹ Panis or Negro: nor was it until the coming of the people whose native air was too pure for a slave that the curse came upon the land.

The permanent settlement by the English of Acadia may fairly be considered as beginning when in 1749 Cornwallis founded Halifax.² Negro slaves were among the population of Halifax from the beginning or very shortly after. Where they came from is uncertain and it has been suggested that they came with the original settlers across the ocean. In the absence of any other explanation more plausible, this might be accepted. Lord Mansfield's decision in the Somerset case was a quarter of a century in the future. But it seems more probable that they were brought from the English Colonies, and some almost certainly were.

The official records of the country exhibit much evidence to this effect. In September, 1751, the *Boston Evening Post* advertised "Just arrived from Halifax and to be sold, ten strong hearty, Negro men mostly tradesman, such

¹ So far at all events as appeared from any records that I have seen; it is just possible, however, that "La Liberté, le neigre" mentioned in de Meulles' Census of Acadia in 1696 was a black slave, notwithstanding his name.

² From 1720 on, Annapolis Royal had a fairly firm government and settlement but it was not until Halifax was founded that it became certain that the country would remain English.

as caulkers, carpenters, sailmakers and ropemakers.³ Any person wishing to purchase may enquire of Benjamin Halliwell of Boston." Such an advertisement indicates that shipbuilding was slack at Halifax and more brisk at Boston. A conjecture may be hazarded that these slaves had been taken by their master to Halifax to build ships and then returned to the colony when required no longer in Acadia.

Some such conjecture receives a little assistance from a will still on record in Halifax. It was made February 28, 1752, by Thomas Thomas "late of New York but now of Halifax" and disposed of his "goods, chattels and negros" including one bequest to this effect: "all my plate and my negro servant Orange that now lives with me at Halifax, I leave and bequeath to my son."

In the same year, *The Halifax Gazette* of May 15 contains the advertisement "Just imported and to be sold by Joshua Mauger at Major Lockman's store in Halifax, several Negro slaves as follows: A woman aged 35, two boys aged 12 and 13 respectively, two of 18 and a man aged 30." In the *Halifax Gazette* of Saturday, May 30, 1752, sale is advertised thus: "Just imported and to be sold by Joshua Mauger, at Major Lockman's store in Halifax, several negro slaves, viz., a very likely negro wench, of about thirty-five years of age, a Creole born, has been brought up in a gentleman's family, and capable of doing all sorts of work belonging thereto, as needle-work of all sorts and in the best manner; also washing, ironing, cooking, and every other thing that can be expected from such a slave: also two negro boys of about 12 or 13 years old, likely, healthy, and well-shaped, and understand some English. Likewise two healthy negro slaves of about 18 years of age, of agreeable tempers and fit for any kind of business: And also a healthy negro man of about 30 years

³ This and most of the facts, dates, etc., in this chapter are taken from the Rev. Dr. T. Watson Smith's fascinating article *The Slave in Canada* in the *Nova Scotia Historical Society's Collections*, Vol. X, Halifax, 1899.

of age." In September 1759, a Halifax merchant, Malachy Salter wrote to his wife then visiting relatives in Boston informing her of the state of the family, saying that "Jack is Jack still but rather worse. I am obliged to exercise the cat or stick almost every day. I believe Halifax don't afford another such idle, deceitful villain"—"Pray purchase a Negro boy if possible."

In the year of the surrender of Montreal, the *Halifax Gazette*, November 1, 1760, advertised "To be sold at public auction on Monday the 3rd of November, at the house of Mr. John Rider, two slaves, viz., a boy and a girl, about 11 years old; likewise a puncheon of choice cherry brandy with sundry other articles."

Some legal sanction, moreover, was given slavery. A General Assembly the first Elective Legislature in what is now Canada, met at Halifax in 1757. In 1762 the second session of the third General Assembly passed an act⁴ which seems not to have received very much attention from legists⁵ and writers. It contains a recognition of slavery. The act provides by section 2 that "in case any soldier, sailor, servant, apprentice, bound servant or negro slave or any other person whatsoever shall leave any pawn or pledge with a vendor of liquor for the payment of any sum exceeding five shillings for liquor such soldier, sailor, servant, apprentice bound servant or negro slave . . . or the master or mistress of such servant, apprentice, bound servant or negro slave" might by proceedings before a Justice of the Peace obtain an order for the restoration of the pawn or pledge—and the vendor might be fined 20 shillings "for the use of the poor."⁶

For this reason slavery could easily continue as subsequent records prove. In July, 1767, Charles Proctor of

⁴ (1762) 2 George III, c. 1 (N. S.), *Statutes at Large, Nova Scotia*, Halifax, 1805, p. 77.

⁵ It is referred to in a letter from Ward Chipman to Chief Justice Blowers to be mentioned later. See post, p. 110, n. 21.

⁶ This Act was continued in 1784 by (1784) 24 George III, c. 14 (N.S.). *Statutes at Large, Nova Scotia*, p. 238.

Halifax sold Louisa, a "Mulotta" girl, to Mary Wood of Annapolis for £15 currency⁷ and next year Mary Wood assigned the girl to her daughter Mrs. Mary Day. In June, 1767, James Simonds of the St. John River wrote to Hazen and Jarvis at Newburyport, Massachusetts, a letter in which he complains of "that rascal negro, West" who cannot be got to do a quarter of a man's work. In an advertisement in a Halifax paper in 1769 are offered for sale to the highest bidder "two hogsheads of rum, three of sugar and two well-grown negro girls aged 14 and 12." These were clearly a consignment from the West Indies. The executors of John Margerum of Halifax deceased, in their accounts give credit for £29.9.4. $\frac{1}{2}$ "net proceeds of a negro boy sold at Carolina." In 1770 the executors of Joseph Gerrish of Halifax lost £30 on the sale of three Negroes for £150 to Richard Williams and Abraham Constable, the Negroes having been appraised at £180: and a Negro boy named John Fame was not then sold. In April 1770, Mrs. Martha Prichard of Halifax, widow, bequeathed to her daughter, wife of Moses Delesdernier a Negro slave woman named Jessie. If Mrs. Delesdernier did not wish to retain the slave, she was to be sold and the proceeds of the sale given to Mrs. Delesdernier. If she kept her, the slave at the death of Mrs. Delesdernier was to be the property of her son Ferdinand. By the same instrument the testatrix bequeathed to her grand-daughter a mulatto slave John Patten two and a half years old.

By the census of the year 1771 the Rev. James Lyon, the first Presbyterian Minister in Nova Scotia, is shown to have owned a colored boy, the only Negro in the township of Onslow and John Young in the township of Amherst also a Negro boy, the only one in the township. In Annapolis, Magdalen Winnett owned a man, woman and girl; Joseph Winnett owned a woman and a boy; Ebenezer Messenger and Ann Williams each a man, and John Stork

⁷ "Halifax currency" was at this time nine-tenths of Sterling £10 currency = £9 sterling and the 5 / dollar being 4/6 sterling.

of Granville owned a man the only Negro in the township; and Henry Evans of Annapolis had the previous year owned a colored girl.

Jacob Hurd of Halifax offered in 1773 a reward of £5 for the apprehension of his runaway Negro, Cromwell, a "short thick set strong fellow," strongly pock marked "especially on the nose" and wearing a green cloth jacket and a cocked hat. In July 1773, in the *Nova Scotia Gazette and Weekly Chronicle* the executor and executrix of Joseph Pierpont of Halifax advertised "a Negro named Prince to be sold at private sale." This perhaps indicated a repugnance to offering human beings for sale by auction. In the *Nova Scotia Gazette and Weekly Chronicle*, March 27, 1775 is an advertisement for the sale of a "likely well-made negro boy about 16 year old."

In the inventory of the estate of the late John Rock appeared in 1776 a Negro woman named Thursday. She was inventoried at £25 but sold for £20. In this year also a Windsor farmer, Joseph Wilson left by will two Negro women Byna and Sylla to his wife. In January 1779 the *Nova Scotia Gazette and Weekly Chronicle* advertised for sale an able Negro woman, about 21 year old, "capable of performing both town and country work and an exceedingly good cook." In the same year Daniel Stratford of Halifax left to his wife a Negro man slave Adam for life, after her death to become the property of his daughter Sarah Lawson. Matthew Harris of Pictou sold for £50 to Matthew Archibald of Truro, tanner, a "Negro boy named Abram, about 12 years of age" born of Harris' Negro slave in Harris' house in Maryland.

In 1780 rewards were offered, one of 3 guineas, for the apprehension and delivery at the office of the Commanding Officer of Engineers at Halifax of two runaway Negro men; another "a handsome reward to be paid for securing in any gaol a Negro boy Mungo about 14 years old and well built"—the owner Benjamin De Wolfe of Windsor to be notified. That year the executors of Colonel Henry

Denny Denson of West Falmouth debit themselves with £75 received for "Spruce," £60 for "John" and £30 for "Juba" and credit themselves with £2.11.6 paid for taking two of these to Halifax probably for sale there.

Abel Michener of Falmouth advertised in 1781 a reward of £5 for the capture of a Negro named James; and Samuel Mack of Port Medway wanted a Negro named "Chance" returned.

Richard Wenman of Halifax in September of that year agreed to give his Negro, Cato, his liberty "if he will faithfully serve my said daughter, Elizabeth Susannah Pringle two years." Captain Wilson of the transport *Friends* requested in 1782 that masters of vessels will not ship as a seaman his runaway Negro lad Ben, saying: "He is my own property."

There is no need for further particularization; for we now come to the year of the definitive peace between the mother country and the new republic. As in the upper country so by the sea there was a great influx of Loyalists, accompanied in many instances by their slaves. Thereafter sales, advertisements for auctions, rewards for runaway slaves, bequests of slaves, &c., are very common and there were some manumissions. That, however, was not the cause of the great increase in the Negro population of the Maritime Province. The Island of St. John, afterwards Prince Edward Island had been set off as a separate province in 1769 but the Province of Nova Scotia included what became the Province of New Brunswick until 1786.

During the Revolutionary War, the British commanders, Sir Henry Clinton in particular, had made it a point to invite the slaves to the British line and many had accepted the invitation. No few of these refugees were of material service to the British troops in various ways both menial and otherwise. At the peace Washington demanded the return of these quondam slaves.⁸ Sir Guy Carleton

⁸ It will be remembered that in the Treaty of Peace it was agreed by Article VII "His Britanic Majesty shall with all convenient speed and without

refused but made a careful inventory of them with full description, name, former master, etc., so that Washington might claim compensation from the British Government, if he saw fit.⁹ In addition to these slaves somewhere about 3,000 freed Negroes accompanied the British troops on their withdrawal from New York, nearly all coming to Nova Scotia. Many of these after suffering great hardships were sent to Sierra Leone on the West Coast of Africa in 1792. Some remained in the province where their descendants are found until this day; but not in any very great numbers. The Loyalists, however, retained their property in their own slaves; and immigration was encouraged by the Act of 1790.¹⁰

The trade in Negroes was very brisk for some years. For example, on June 24, 1783, the *Nova Scotia Gazette and Weekly Chronicle* advertised for sale a Negro woman, "25 years of age, a good house servant." On December 11, 1783, Captain Alexander Campbell late of the South Carolina Loyalists sold to Captain Thomas Green late of the Royal Nova Scotia Foot a Negro woman named Nancy for

causing any destruction or carrying away any negroes or other property of the American inhabitants withdraw his armies, garrisons and fleets from the said United States. . . ."

Sir Guy Carleton claimed that the Negroes who had taken refuge in the British lines at once lost their status of slavery and became free. They were "not Negroes or other property of the American," a rather technical not to say finely drawn distinction but *in favorem libertatis*; and in any event Britain would not betray the helpless who had put their faith in her.

⁹ Washington did make a claim; but the United States had not carried out its part of the contract and Britain would not and never did pay. Jones' *Loyalist History of New York*, Vol. 2. p. 256, says that the number of Negroes who found shelter in the British lines was 2000 at least; probably this is an underestimate. Hay's *Historical Reading* at p. 249 gives the number of Negroes who came into Nova Scotia with their Masters at least 3000—and of free Negroes 1522 at Shelburne, 182 at St. John River. 270 at Guysborough, 211 in Annapolis County, and a smaller number at other places. 1200 were sent to Sierre Leone in 1792.

¹⁰ See ante, p. 37. The Negro population in 1784 estimated at about 3000 was included in the 28,347 of *Disbanded Troops and Loyalists called New Inhabitants*, *Can. Arch.*, Report for 1885, p. 10. There were some free Negroes in various companies of the British forces in one capacity or another.

£40. Nancy two years later was sold by Green to Abraham Forst of Halifax and a year later still with her child Tom to Gregory Townsend.

A shipment was made by John Wentworth from Halifax to Surinam, Dutch Guiana, of nineteen Negro slaves, "all American born or well seasoned . . . perfectly stout, healthy, sober, orderly, industrious and obedient." These, said he, "I have had christened and would rather have liberated them than send them to any estate that I am not sure of their being treated with care and humanity which I shall consider as the only favour that can be done to me on this occasion "by his correspondent."¹¹

On October 29, 1787, John Rapalje, a Royalist, sent from Brooklign (Brookland or Brooklyn Ferry) to George Leonard by desire of his (R's) father a Negro woman named Eve about 35 years and her child named Suke about 15 to sell as he himself cannot go to Nova Scotia. Eve was one of the best servants "perfectly sober, honest" and the only fault she had was her near sight.

The records show occasional manumission also. In 1784 the inventory of the estate of John Porter late of Cornwallis, a Negro man is valued at £80. That same year Charles Montague of Halifax says: "I have only one Negro, named Francis; he is to have his freedom." In May 1787, Mar-

¹¹ The Negroes sent were Abraham, James, Lymas, Cyrus, John, Isaac, Quako, January, Priscella, Rachel, Venus, Daphne, Ann, Dorothy and four children Celia, William, Venus, Eleanora—reserving Matthew and Susannah at home. All these had been christened, February 11, 1784. "Isaac is a thorough good carpenter and master sawyer, perfectly capable of overseeing and conducting the rest and strictly honest; Lymas is a rough carpenter and sawyer; Quako is a field negro has met with an accident in his arm which will require some indulgence. The other men are sawyers and John also a good axeman. Abraham has been used to cattle and to attend in the house, &c. All the men are expert in boats. The women are stout and able and promise well to increase their numbers. Venus is useful in the hospital, poultry yard, gardens, etc. Upon the whole they are a most useful lot of Negroes."

John Wentworth, last Royalist Governor of New Hampshire and afterwards Sir John Wentworth, Lieutenant Governor of Nova Scotia, doubtless believed himself to be a good man and a good Christian.

The story of Eve and Suke *infra* is told by Archdeacon Raymond, 3 *N. B. Mag.*, 1899, p. 221.

garet Murray, widow of Halifax by her will manumitted her two Negro women Marianne and Flora; and (when he was 21) her Negro boy Brutus. From the records of a trial at Shelburne, in a magistrate's court in 1788 it appears that one Jesse Gray of Argyle had sold a Negro woman for 100 bushels of potatoes. At a trial the ownership by Gray was proved and the sale confirmed.

We now come to the times of a Chief Justice whose heart was set on destroying slavery in the province of Nova Scotia, therein wholly differing from the Chief Justice of New Brunswick, George Duncan Ludlow, who had received his appointment on the separation of that province in 1784. The forward-looking jurist was Thomas Andrew Strange who became Chief Justice of the Supreme Court in 1791.¹² The same impulse for liberty which about this time was noted in the upper country manifested itself from time to time by the sea. Slaves ran away from their masters; the masters pursued and imprisoned them. Some blacks claimed freedom without fleeing. When a writ of habeas corpus came up in the Supreme Court, Chief Justice Strange did his best to avoid giving a decision. He knew that slavery was lawful but he knew it was detestable and he pursued a course which did not require him to stultify himself but which would nevertheless confer substantial benefits upon the black claiming liberty.

He endeavored in every case to bring the parties to an agreement to sign articles whereby the master would have the services of the Negro for a stated time, after the expiration of which the Negro received his freedom. When the master refused this, as sometimes there was a refusal, the Chief Justice required the matter to be tried by a jury, which usually found for the Negro.¹³

¹² He went to England in 1796 (it was said, for a visit) resigned his position in Nova Scotia, was Knighted and appointed Recorder of Fort St. George, Bombay, India.

¹³ A collateral ancestor of my own, the Reverend Archibald Riddell, had the advantage of a similar proceeding a century before. Being apprehended for taking part in the uprising of the Covenanters in Scotland he was given

The practice adopted was like the practice in cases of alleged villenage in England. It was recognized that slavery might exist in Nova Scotia, but it was made as difficult as possible for the master to succeed on the facts. Except the act already mentioned there was no statute recognizing slavery and an attempt in 1787 to incorporate such a recognition in the statute law failed of success by a large majority. The existing act, too, was given what seems a very forced and unnatural interpretation so as to emasculate it of any authority in that regard.

Salter Sampson Blowers, the Attorney General, fully agreed with the Chief Justice's plan. On one occasion he threatened to prosecute a person for sending a Negro out of the province against his will.¹⁴ The Negro managed to get back and the master acknowledged his right, so that no proceedings were necessary. After a number of verdicts for the alleged slaves, masters were generally very willing

(or sold) with others to a Scottish Laird who chartered a vessel and proceeded to take his human chattels to America for sale. The plague broke out on the ship, the Laird and his wife died of it as did some of the crew. When the ship reached New Jersey, there being no master, the "slaves" escaped up country. The Laird's son-in-law and personal representative came to America and claimed Riddell and others. The governor called a jury to determine whether they were slaves and the jury promptly found in their favor. Riddell preached in New Jersey until the Revolution of 1688 made it safe for him to return to Scotland. Juries in such cases are liable to what Blackstone calls "pious perjury." All this practice was based upon the common law proceedings when a claim was made of villenage. When a person claimed to be the lord of a villein who had run away and remained outside the manor unto which he was regardant, he sued out a writ of *neif*, that is, *de nativo habendo*. The sheriff took the writ and if the *nativus* admitted that he was villein to the lord who claimed him, he was delivered by the sheriff to the lord of the manor; but if he claimed to be free, the sheriff should not seize him but the Lord was compelled to take out a *Pone* to have the matter tried before the Court of Common Pleas or the Justices in Eyre, that is, the *assizes*. Or the alleged villein might himself sue out a writ of *libertate probanda*: and until trial of the case the lord could not seize the alleged villein. The curious will find the whole subject dealt with in Fitzherbert's *Natura Brevium*, pp. 77 sqq.

¹⁴ This is very much like the Chloe Cooley case in Upper Canada. I do not know what form the prosecution could possibly take if the Negro was in fact a slave. See Chapter V, note 5 ante, p. 55.

to enter into articles whereby the slave after serving faithfully for a fixed number of years was given his freedom.

After Blowers became Chief Justice, 1797,¹⁵ he continued Chief Justice Strange's practice with marked results. In one case of which he tells where he had discharged a black woman from the Annapolis gaol on habeas corpus and an action had been brought, the plaintiff proved that he had bought her in New York; but the Chief Justice held that he had not proved the right of the seller so to dispose of her and directed the jury to find for the defendant which they promptly did.

Slavery continued, however. Almost every year we find records of sales, advertisements for runaway slaves, bequests of slaves, &c, till almost the end of the first decade of the 19th century, the latest known bill of sale is dated March 21, 1807 and transfers a "Negro Woman named Nelly of the age of twenty five or thereabout." It was, however, decadent and from about the beginning of the 19th century was quite as much to the advantage of the Negro in many cases as that of the master.

¹⁵ It is said that August 1797 was the date of the last public slave sale at Montreal, that of Emmanuel Allen for £36.

The last advertisement for sale by auction of a slave in the Maritime Provinces seems to be that in *The Royal Gazette and Nova Scotia Advertiser* of September 7, 1790, where William Millet of Halifax offers for sale by auction September 9 "A stout likely negro man and sundry other articles."

In 1802 the census showed that there were 451 Blacks in Halifax; in 1791 there were 422.

Dr. T. Watson Smith says in a paper "Slavery in Canada" republished in "Canadian History," No. 12, December, 1900, at p. 321.

"About 1806, so Judge Marshall has stated, a master and his slave were taken before Chief Justice Blowers on a writ of habeas corpus. When the case and the question of slavery in general had been pretty well argued on each side, the Chief Justice decided that slavery had no legal place in Nova Scotia."

I have not been able to trace such a decision and cannot think that it has been correctly reported. Dr. Smith is wholly justified in his statement "there is good ground for the opinion that this baneful system was never actually abolished in the present Canadian Provinces until the vote of the British Parliament and the signature of King William IV in 1833 rendered it illegal throughout the British Empire."

A final effort to legalize slavery in Nova Scotia was made in 1808. Mr. Warwick, member for Digby Township, presented a petition from John Taylor and other slave owners setting up that the doubts entertained by the courts rendered their property useless and that the slaves were deserting and defying their masters. They asked for an act securing them their property or indemnifying them for their loss. Thomas Ritchie member for Annapolis introduced a bill to regulate Negro servants within the province. The bill passed its second reading January 11, 1808, but failed to become law; and the attempt was never renewed.

New Brunswick was separated from Nova Scotia in 1784. The Chief Justice of that province was not as averse from slavery as his brother of Nova Scotia. One of the most interesting and celebrated cases came before the Supreme Court of New Brunswick in Hilary Term, February 1800. Captain Stair Agnew who had been an officer in the Queen's Rangers settled opposite Fredericton. He was a man much thought of as is shown by his being chosen for thirty years to represent York County in the Legislature. He owned a slave Nancy Morton¹⁶ who claimed her freedom and whom apparently he had put in charge of one Caleb Jones. A writ of habeas corpus was obtained directed to Jones and the matter was arranged to be argued before the full court of four judges. For the applicant ap-

¹⁶ I. Allen Jack, Q. C., D. C., L., of St. John, New Brunswick, gives a full account of this case from which (and similar sources) most of the facts are taken. In a paper read before the Royal Society of Canada May 26, 1898, *Trans. R. S. Can.*, 1898, pp. 137 sqq., Dr. Jack conjectures that Nancy Morton is the Negro female slave conveyed by bill of sale registered in the office of the Register of Deeds, St. John's, N. B. Slaves were treated as realty as regards fieri facias under the Act of 1732 (see ante, p. 13, n. 12) and at least "savoured of the realty." The bill of sale registered January 31, 1791, was dated November 13, 1778, and was executed by John Johnson of the Township of Brooklyn in King's County, Long Island, Province of New York. It conveyed with a covenant to warrant and defend title to Samuel Duffy, Inn-keeper for £40 currency (say \$100) "a certain negro female about fourteen years of age and goes by the name of Nancy," pp. 141, 142. However that may be, Stair Agnew bought Nancy from William Bailey of the County of York in the Province of New Brunswick for £40 with full warranty of title as a slave.

peared Ward Chipman¹⁷ and Samuel Denny Street; for the master, Jonathan Bliss, Attorney General of the province, Thomas Wetmore, John Murray Bliss, Charles J. Peters and Witham Botsford, all men of ability and eminence. On the Bench were Chief Justice Ludlow and Puisne Justices Allen, Upham and Saunders.

The addresses of the Attorney-General and Mr. Chipman are extant. The former divided his speech into thirty-two heads; the latter took eighty pages of foolscap for his. The arguments were extremely able and exhaustive,¹⁸ everything in history, morals and decided cases being brought to bear. The case took two full days to argue and after careful consideration the court divided equally, the Chief Justice and Mr. Justice Upham affirming the right of the master and Mr. Justice Allan and Mr. Justice Saunders held for the alleged slave.

The return of Jones to the writ was that Nancy "was at the time of her birth and ever since hath been a female Negro slave or servant for life born of an African Negro slave and before the removal of the said Caleb Jones from Mary Land to New Brunswick was and became by purchase the lawful and proper Negro slave or servant for life of him the said Caleb Jones . . . , that the said Caleb Jones in the year of our Lord 1785 brought and imported the said . . . Nancy his Negro slave or servant for life into the Province of New Brunswick . . . and has always hitherto held the said . . . Nancy as his proper Negro slave or servant for life . . . or by laws he has good right and authority to do. . . ."¹⁹

¹⁷ He was born in Boston in 1753, the son of John Chipman, a member of the Bar. Graduating at Harvard, he joined the Boston Bar and practised in that City until 1776. After the Peace he went to England and in 1784 sailed for New Brunswick of which he was appointed Solicitor General. After a quarter of a century of successful practice he was appointed 1808 a puisne judge of the Supreme Court. He died in February, 1826.

His services to Nancy Morton were given without fee or hope of reward.

¹⁸ That of Mr. Chipman is given in *Trans. R. Soc. Can.*, 1898, pp. 155-184.

¹⁹ It will be seen that the return sets up that Jones bought and owned the slave and the case was argued on that hypothesis, but the historians say that Captain Stair Agnew was the owner. The point is not of importance.

The Chief Justice based his opinion on what he called the "Common Law of the Colonies"—and although that expression was ridiculed at the time and has been since, there is no difficulty in understanding it. He meant custom recognized as law not contained in an express legislative enactment. In that sense a modern lawyer will agree that he was right. Practically all the English colonies had slavery thoroughly recognized and often without or before legislation; and all the well known legal maxims asserted the cogency of such custom.²⁰ Mr. Justice Allen considered that no human power could justify slavery—and his brother Saunders agreed with him. It would seem that these judges were concerned with what the law should be, the others with what it actually was.²¹

In the result the return was held sufficient and the master had his slave. But the decision of the divided court had its effect. Agnew reconveyed Nancy to William Bailey from whom he had bought her and she bound herself to serve for fifteen years, then to receive her freedom.²² The result of this case was that while slavery was

²⁰ *Mos regit legem, Mos pro lege, Leges moribus servant, Consuetudo est optimus interpret legum*, custom is the life of the law, custom becomes law, &c., &c. That slavery was necessary and therefore legal in the American Colonies was admitted in the Somerset case.

²¹ The modern lawyer, in my opinion, would find no difficulty in coming to the same conclusion as the Chief Justice.

Mr. Chipman in his interesting correspondence with Chief Justice Blowers (*Trans. R. Soc. Can.*, 1898, pp. 148 sqq.) admits that if his opponents had hit upon the Nova Scotia Statute of 1762 as revised in 1783 "the conclusiveness of their reasoning on their principles would have been considered as demonstrated." He adds: "In searching your laws upon this occasion I found this clause but carefully avoided mentioning it," which raises a curious question in legal ethics.

²² The reconveyance to Bailey, a quit claim deed, is witnessed by George Leonard and Thomas Wetmore and is dated February 22, 1800. The indenture by which Nancy bound herself for fifteen years is dated February 23, 1800.

If Dr. Jack is right in his conjecture the argument took place when she was 36 and she would receive her freedom when she was 51. Agnew challenged Judge Allen for some reflection upon him by the Judge; the challenge was declined and Agnew then challenged Street who accepted—and they fought a bloodless duel. Street later in 1821 fought a duel with George Lud-

not formally abolished, it before many years practically ceased to exist.²³

Prince Edward Island was called Isle St. Jean until 1798. In this island slavery had the same history as in the other maritime provinces. Shortly after the peace Negro slaves were brought into the Island by their United Empire Loyalist masters. As late as 1802 we find recorded the sale of "a Mulatto boy three years old called Simon" for £20, Halifax currency, then £18 sterling, and a gift of "one Mulatto girl about five years of age named Catherine." We also find Governor Fanning (1786-1804), freeing his two slaves and giving one of them, Shepherd, a farm.

In Cape Breton which was separate from 1784 to 1820, Negro slaves were found as early as the former date: "Cesar Augustus, a slave and Darius Snider, black folks, married 4th September 1788," "Diana Bestian a Negro girl belonging to Abraham Cuyler Esq" was buried September 15, 1792 and a Negro slave was killed in 1791 by a blow from a spade when trying to force his way into a public ball in Sydney.²⁴ In this province, too, slavery met the same fate.

There is now to be mentioned an interesting series of circumstances.²⁵ During the War of 1812-15 the British navy occupied many bays and rivers in United States terri-

low Wetmore over words which passed on leaving the Court. Wetmore was struck in the head and died in a few hours. Street was tried and acquitted. One result of this case was that Mr. Justice Upham freed his slaves. His wife had six inherited from her father and he himself had some, one a girl born in the East Indies whom he had bought from her master in New York, the master of a ship, afterwards married a soldier in Colonel Allen's regiment.

²³ What is believed to be the last advertisement for the sale of a slave in any maritime province is in the New Brunswick *Royal Gazette* of October 16, 1809 when Daniel Brown offered for sale Nancy a Negro woman, guaranteeing a good title. The latest offer of a reward for the apprehension of a runaway slave is said to be in the same paper for July 10, 1816.

²⁴ For this act the perpetrator was excluded by his masonic lodge; being brought to trial before the Supreme Court in August 1792 he was "honourably acquitted" and afterwards he was reinstated by his lodge.

²⁵ Seldom mentioned and never much boasted of in the United States.

tory and in some cases troops were landed where there was a slave population. These forces came into possession of many slaves, mostly voluntary fugitives, some seduced and some taken by violence from their masters. Admiral Cochrane in April 1814 issued a proclamation inviting all those who might be disposed to emigrate from the United States for the purpose of becoming free settlers in some of "His Majesty's Colonies" to come with their families on board of the British men of war and offering them the choice of joining the British forces or being sent as free settlers to a British possession. He did not say "slaves" but no one could mistake the meaning.²⁶ Negroes came in droves. Some were taken to the Bahamas and the Bermudas where their descendants are to be found until this day; many were taken to Nova Scotia and New Brunswick.²⁷

When the Treaty of Peace was concluded at Ghent, December 24, 1814 the United States did not forget the slaves who had got away from the home of liberty. Article 1 provided for the delivery up of all places taken by either party without carrying away any property captured "or any slaves or other private property." The United States demanded the restoration of "all slaves and other private property which may now be in possession of the forces of

²⁶ The word *Camouflage* may be new. The practice antedated humanity.

²⁷ There is a record of 371 arriving at St. John from Halifax on May 25, 1815, by the *Romulus*, who had taken refuge on board the British Men of War in the Chesapeake. The Negro settlement at Loch Lomond was founded by them.

At the Census of 1824, 1421 "persons of color" were found in New Brunswick. The Very Rev. Archdeacon Raymond, an excellent authority, thinks most of these "were at one time slaves or the children of slaves," but many were not slaves in New Brunswick.

Those that were brought by Admiral Cochrane to Halifax became a great burden to the community. It was proposed in 1815 by the British Government to remove them to a warmer climate, but this scheme does not seem to have been carried out. By a census taken in 1816 there was found to be 684 in Halifax and elsewhere in Nova Scotia. In the winter of 1814-15 they had suffered rather severely from small pox and were vaccinated to prevent its spread. Some were placed on Melville Island.

His Britannic Majesty." The British officers refused to surrender the slaves contending that the real meaning of the treaty did not cover the case. At length in 1818 a convention was entered into that it should be left to the Emperor of Russia²⁸ to decide whether the United States by the true intent of Article 1 was entitled to the restitution or full compensation for the slaves.

In 1822 the Emperor decided in favor of the United States. Thereupon the next year (1824) a mixed commission of two commissioners and two arbitrators determined the average value to be allowed as compensation;²⁹ for slaves taken from Louisiana \$580; from Alabama Georgia and South Carolina, \$390; from Virginia, Maryland and all other States \$280.

The commissioners adjourned for the purpose of enabling evidence to be obtained as to the numbers. Clay submitted to the British Government that 3601 slaves had been taken away but was willing for a settlement to accept the price of 1650. Britain declined, but the commissioners failed to agree and finally by diplomacy in 1827 Britain agreed to pay £250,000 or \$1,204,960 in full for slaves and other property. Thus Britain assured the freedom of more than 3,000 slaves and paid for them, a fitting prelude to the great Act of 1833 whereby she freed 800,000 slaves and paid £20,000,000 for the privilege.³⁰

²⁸ Presumably because he had the greatest number of serfs in the world and was, therefore, the best judge of slaves.

²⁹ Of course, Britain refused to give up a single fugitive. She could not betray a trust even of the humblest. She knew that in "the land of the free and the home of the brave" for the Negro returned to his master, to be brave was to incur torture and death and death alone could make him free.

³⁰ The Act (1833) 3, 4 William III, c. 73 (Imp.), passed the House of Commons August 7 and received the Royal Assent August 28, 1833; and there were no slaves in all the British world after August, 1838.

CHAPTER VIII

GENERAL OBSERVATIONS

The curse of Negro slavery affected the whole English speaking world; and that part of the world where it was commercially profitable resisted its abolition. The British part of this world does not need to assert any higher sense of justice and right than had those who lived in the Northern States; and it may well be that had Negro slave service been as profitable in Canada as in the Cotton States, the heinousness of the sin might not have been more manifest here than there. Nevertheless we must not too much minimize the real merit of those who sought the destruction of slavery. Slaves did not pay so well in Canada as in Georgia, but they *paid*.

It is interesting to note the various ways in which slavery was met and finally destroyed. In Upper Canada, the existing slaves, 1793, remained slaves but all those born thereafter were free, subject to certain conditions of service. There was a statutory recognition of the existing status and provision for its destruction in the afterborn. This continued slavery though it much mitigated its severity and secured its downfall in time. But there were slaves in Upper Canada when the Imperial Act of 1833 came in force. The Act of 1793 was admittedly but a compromise measure; and beneficial as it was it was a paltering with sin.

In Lower Canada, there was no legislation, and slavery was never formally abolished until the Imperial Act of 1833; but the courts decided in effect if not in form that a master had no rights over his slave, and that is tantamount to saying that where there is no master there is no slave. The reasoning in these cases as in the Somerset case may not recommend itself to the lawyer but the effect is undoubtedly, "Slaves cannot live in Lower Canada."

In Nova Scotia, there was no decision that slavery did not exist. Indeed the course of procedure presupposed that it did exist, but the courts were astute to find means of making it all but impossible for the alleged master to succeed; and slavery disappeared accordingly.

In New Brunswick the decision by a divided court was in favor of the master; but juries were of the same calibre and sentiments in New Brunswick as in Nova Scotia and the same results were to be anticipated, if Nova Scotian means were used; and the slave owners gave way.

In the old land, judicial decision destroyed slavery on the British domain; but conscience and sense of justice and right impelled its destruction elsewhere by statute; and the same sense of justice and right impelled the Parliament of Great Britain to recompense the owners for their property thus destroyed. If there be any more altruistic act of any people in any age of the world's history I have failed to hear or read of it.

In the United States, slavery was abolished as a war measure. Lincoln hating slavery as he did would never have abolished it, had he not considered it a useful war measure. No compensation was paid, of course.¹ Everywhere slavery was doomed and in one way or another it has met a deserved fate.

¹ I had with the late Hon. Warwick Hough of St. Louis, Missouri, who had been an officer in the Southern Army, several conversations on the subject of slavery. He gave it as his firm conviction that, had the South succeeded in the Civil War, it would shortly have itself abolished slavery and sought re-admission to the Union. His proposition was that the power and influence of the planter class were waning, while the manufacturers, merchants and the like were increasing in number and influence and they would have for their own protection abolished slavery. I have not met a Northerner or a Canadian who agreed with this view; but a few Southerners have expressed to me their general concurrence with my friend's proposition.

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NOTES ON THE SLAVE IN NOUVELLE-FRANCE

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The French Canadian historian, François-Xavier Garneau, in his *Histoire du Canada*, says: "Nous croyons devoir citer ici une résolution qui honore le gouvernement français: c'est celle qu'il avait prise de ne pas encourager l'introduction des esclaves en Canada, cette colonie que Louis XIV préférait à toutes les autres à cause du caractère belliqueux de ses habitants; cette colonie qu'il voulait former à l'image de la France, couvrir d'une brave noblesse et d'une population vraiment nationale, catholique, française sans mélange de races. En 1688, il fut proposé d'y avoir des nègres pour faire la culture. Le ministère répondit qu'il craignait qu'ils n'y périssent par le changement de climat et que le projet ne fût inutile. Cela anéantit pour ainsi dire une entreprise qui aurait frappé notre société d'une grande et terrible plaie. Il est vrai que dans le siècle suivant, on étendit à la Louisiane le code noir des Antilles; il est vrai qu'il y eut ici des ordonnances sur la servitude: néanmoins l'esclavage ne régnait point en Canada: à peine y voyait-on quelques esclaves lors de la conquête. Cet événement en accrut un peu le nombre un instant; ils disparurent ensuite tout à fait."¹

In another place speaking of the proposal of Denonville, the Governor, and De Champigny, the Intendant, at Quebec, in 1688 to introduce Negro slaves by reason of the scarcity and dearness of domestic and agricultural labor, and the refusal in 1689 of the minister to permit, Garneau says: "C'était assez pour faire échouer une entreprise, qu'aurait greffé sur notre société grande et terrible plaie paralyse la force d'une portion considérable de l'Union

¹ Quoted by the Archivist of Quebec in the work cited (*infra*) at p. 109, from F. X. Garneau, *Histoire du Canada*, 4th Ed., Vol. II, p. 167. See note 2 for translation.

Americaine, l'esclavage, cette plaie inconnue sous notre ciel du Nord."²

This language has been considered by some—rather heedlessly be it said—to indicate that Garneau thought that Negro slavery did not exist in French Canada, but a careful examination of his actual words will show that he denied only the prevalence “l'esclavage ne régnait point en Canada,” not the existence. Slavery was not so widespread in Canada as to become a curse, “a great and terrible plague,” “paralyzing energy.”

² F. X. Garneau, *Histoire du Canada*, 1st Ed., Vol. II, p. 447. Andrew Bell, *History of Canada*, Montreal, 1862 (translated from Garneau's work). Vol. I, p. 440, treats the statement of Garneau somewhat slightly. His translation reads: “In 1689, it was proposed to introduce Negroes to the colony. The French ministry thought the climate unsuitable for such an immigration and the project was given up. Thus did Canada happily escape the terrible curse of Negro Slavery.” Bell's note, pp. 440, 441, shows that he understood what the facts actually were.

The translation of the two passages follows:

“We think we should mention here a determination which is honorable to the French Government. It is the resolve not to encourage the introduction of slaves into Canada, the colony which Louis XIV preferred to all the others by reason of the warlike character of its inhabitants—the colony which he wished to make in the image of France, to fill with a brave noblesse and a population truly national, Catholic, French, without an admixture of foreign races. In 1688, it was proposed to have Negroes there as farm laborers: the minister replied that he feared that they would die there by the change of climate, and that the project would be futile. That, so to speak, destroyed forever an enterprise which would have struck our society with a great and terrible plague. It is true that in the succeeding century, the *Code Noir* of the Antilles was extended into Louisiana, it is true that there were ordinances as to slavery there; but, nevertheless, slavery did not prevail in Canada. There were scarcely any slaves at the time of the conquest. That event increased the number of them a little; they later disappeared entirely.”

“That was sufficient to wreck a scheme which would have engrafted in our society that great and terrible plague which paralyzes the energies of so considerable a part of the American Union, slavery, that plague unknown under our northern sky.”

It will be seen that Garneau does not say or suggest that slavery was entirely unknown in French Canada, but only that it did not “reign” (ne régnait point), i.e., was not prevalent; that while there were a few sporadic cases, the disease was not endemic, and it did not become a plague.

For the proposal of 1688-9, see my *The Slave in Canada*, pp. 1, 2 and notes (JOURNAL OF NEGRO HISTORY, Vol. V, No. 3, July 1920, and published separately by The Association for the Study of Negro Life and History, Washington, 1920).

If there were any doubt as to the existence of Negro (and other) slavery in Canada before the British Conquest, it would be dispelled by the document printed in the latest Report of the Archivist of the Province of Quebec.* These are Notarial Acts (*Actes notariés*) preserved in the Archives at Quebec and are of undoubted authenticity; they range from September 13, 1737 to August 15, 1795, the first 14 being before the capture of Quebec in 1759, the last 3 after that event.

The first document is the sale of a Negro⁴ called Nicolas by Joseph de la Tesserie, S. de la Chevrotière, ship-captain, to François Vederique of Quebec, ship-captain, for 300 livres.⁵ The Negro was about 30 years of age and the Act was passed before midday, September 13, 1757.

The fourth, September 25, 1743, evidences a sale of five

* *Rapport de L'Archiviste de la Province de Quebec pour 1921-1922* . . .
 Ls—A. Proulx Imprimeur de Sa Majeste le Roi /1922: large 8 vo., pp. 452. This Report is well printed on good paper, with excellent arrangement and faultless proof reading; both in form and in matter it is a credit to the able and learned Archivist, M. Pierre-Georges Roy, Litt.D., F. R. S. Can., and to the Government of Quebec. To anyone with a knowledge of French, the publications of this Department are of inestimable value on the early history of that part of Canada.

⁴ "Le nommé Nicolas, negre de nation" was present with vendor and purchaser before the Notaries, Boisseau and Barolet, in the office of the latter at Quebec. The Vendor says that he had acquired the Negro from Sieur de St. Ignace de Vincelotte.

⁵ From the official Report of General James Murray, Governor of Quebec, to the Home Government June 5, 1762, it appears that he considered the livre worth 2 shillings sterling, about 48 cents.

General Murray's Report will be found in Drs. Shortt and Doughty's *Documents relating to the Constitutional History of Canada, 1759-1791*, Ottawa, 1918 (2d. Edit.), pp. 47-81. It is, however, quite clear that the evaluation is too high. The livre was the old French monetary unit which was displaced by the franc. In the first ordinance passed by the civil government at Quebec, the ordinance of September 14, 1764, the value of a French crown or six livre piece was fixed at 6/8, making the livre 13 1/3 pence sterling (about 26 cents). The Ordinance of March 29, 1777, 17 George 3, c. IX, made the "french crown or piece of six livres *tournois*" worth 5/6; and the same value was assigned to it in Upper Canada by the Act (1796) 36 George 3, c. I, s. 1 (U. C.)—the livre was worth not far from 20 cents of our present money. This was the livre *tournois*. The livre of Paris was also in use until 1667 and was worth a quarter more than the livre *tournois*.

Negro slaves, two men and three women and girls* then in the house of "la dame Cachelièvre," the vendor being Charles Réaume, merchant of l'Isle Jésus near Montreal, the purchaser Louis Cureux dit Saint-Germain, for 3000 livres.

The seventh, January 27, 1748, is the sale of a Negro⁷ slave called Robert, 26 to 27 years of age, by Damelle Marie-Anne Guérin, widow of Nicolas Jacquin Philibert, merchant of Quebec, to Pierre Gautier, sieur de la Veranderie, for 400 livres in cash or bills payable by the Treasurer of the Navy having currency in the country as money—the Negro to be delivered on the first demand "avec seulement les hardes qu'il se trouvera avoir lors de la livraison et trois chemises."⁸

The eighth, June 6, 1749, evidences the sale by Amable Jean-Joseph Came, Esquire, sieur de St. Aigne, officer in the troops in Quebec (a detachment from the troops of L'Isle Royale), to Claude Pécaudy, Esquire, sieur de Contrecoeur, Captain of the troops (a detachment of the Navy) in garrison at Montreal, of a Negro woman, Louison, about 17 years old, for 1000 livres.

The tenth, May 26, 1751, gives us the sale by Jacques Damien of Quebec to Louis Dunière, Jr., of a Negro, Jean Monsaige "pour le servir en qualité d'esclave," for 500 livres. But as "le dit nègre paraissant absent du jour d'hier soir, pour par le dit . . . Denière disposer du dit nègre comme chose à luy appartenant le prenant le

*"Cinq neigres esclaves dont deux hommes et trois femmes et filles"—names and ages not given; but the slaves are identified by the statement that the purchaser had seen them "chez la dame Cachelièvre." The witnesses were Louis Lambert and Nicolas Bellevue of Quebec and the Notary was Pinguet. The vendor, Réaume, signed but the purchaser St. Germain did not, "ayant déclaré ne sçavoir écrire ni signer."

⁷"Negre esclave"—the spelling vacillates between "neigre," "negre," and "nègre." I have not found the first form in French literature; the word comes from the mediaeval "Niger." See Du Cange, *sub voc.* The word no doubt had the usual variations; modern French has only the last form, i.e., nègre. My French Canadian friends cannot help me as to the spelling; but they tell me of a French Canadian saying "Un plan de negre" meaning "Un plan qui n'a ni queue ni tête," but this is probably only jealousy.

⁸"With only the clothes he stands in at the time of delivery and three shirts." "Shirt" has no gender in French.

dit . . . Dunière sur ses risques, périls et fortune, sans que le dit . . . Dunière puisse tenir à aucune" and it is expressly provided "le dit . . . Damiens sic cède, quitte et transporte au dit . . . Dunière sans aucune garantie le dit nègre pour par le dit . . . Dunière en disposer ainsy qu'il avisera." What a tragedy lies underneath these words!⁹

The thirteenth, May 4, 1757, is a sale by Estienne Dassier, formerly Captain in the Navy, then living "en sa maison, rue de Buade," Quebec, to Ignace-François Delzenne, merchant-goldsmith, living "en sa maison, rue de la Montagne," of a Negro, Pierre, about 18 years of age, whom the purchaser had had in his house since the previous November. The Negro is sold for 1192 livres, 600 in cash, 592 in a fortnight, whatever happens to the Negro who is now to be at the risk of Delzenne, the purchaser. The purchaser as security hypothecates all his property movable and immovable. He also expresses his knowledge of and satisfaction with the condition of the Negro.¹⁰ On July 1, 1757, Dassier acknowledges payment of the 592 livres.

These are all sales of Negros during the French regime; there are two instances of sales of Mulattoes in this period, but there are five of the sale of Indian slaves, Panis (fem. Panise).¹¹

⁹ Dunière receives the right to dispose of the Negro, Jean Monsaige, as his own property, but Damien does not undertake delivery: The slave being absent since the previous evening (perhaps like Eliza knowing of a proposed sale), Dunière takes all the risk of obtaining him without recourse to anyone in case of failure; and Damien sells him without any warranty. This and the fifth are the only instances, until the seventeenth, of a Negro having a family name. The notaries are Barolet and Panet.

¹⁰ The purchaser undertakes all risks, the price remains payable in any event. "Laquelle somme demeure acquise au d. s. Dassier par convention expresse quelque evenement qui puisse arriver au d. neigre d'en cy-devant aux risques et perils du d. s. Delzenne."

¹¹ As to Panis, Panise, see *The Slave in Canada*, p. 2 and note 4. The name Pani or Panis, anglicized into Pawnee, was used generally in Canada as synonymous with "Indian Slave" because the slaves were usually taken from the Pawnee tribe. It is held by some that the Panis were a tribe wholly distinct from the tribe known among the English as Pawnees, e.g., Drake's *History of the Indians of North America*.

The second act, September 14, 1737, is the sale by Hugues Jacques Péan, Seigneur of Livaudière, Chevalier of the Military Order of St. Louis, Town Major of Quebec, to Joseph Chavigny de la Chevrotière, captain and proprietor of the ship *Marie-Anne* then in the roads of Quebec, of an Indian girl Thérèse of the Renarde Nation, about thirteen or fourteen, and not baptized.¹² The purchaser had seen her, admitted her soundness in life and limb (le connaît pour être saine et n'être estropiée en aucune façon) and paid 350 livres for her. The vendor was to keep the "sauvagesse" until the departure of the purchaser, not later than the end of the coming month, but not to guarantee against accident, sickness or death, binding himself only to treat her humanely and as he had been doing.

The third, October 1, 1737, gives the sale by Augustin Bailly, Cadet in the troops of the marine residing ordinarily at Saint-Michel in the Parish of Saint-Anne de Varennes, to Joseph de Chavigny de la Chevrotière, Sieur de la Tesserie,¹³ Captain in the Navy, of an Indian (male) of the Patoqua Nation, age not given, bought by Bailly on the ninth of May preceding from Jean-Baptiste Normandin dit Beausoleil according to a contract passed before Loyseau, Notary at Montreal. The price was 350 livres, 250

¹² We are told, Littré, *Dictionnaire de la Langue Française*, 4to, Paris, 1869, *Sub voc.* Nègre: "Louis XIII se fit une peine extrême de la loi qui rendait esclaves les nègres de ses colonies; mais quand on lui eut bien mis dans l'esprit que c'était la voie la plus sûre pour les convertir, il y consentit." (Montesquieu *Esp. des Loix*, XV, 4) "Louis XIII was much troubled concerning the law which made slaves of the Negroes in his Colonies; but when he had become impressed with the view that that was the surest way to convert them, he consented to the law,"—the ever recurring excuse for the violation of natural right.

There was much discussion whether it was lawful to hold a fellow Christian in slavery; and it was a distinct advantage that a slave was not baptized. In 1781, the Legislature of the Province of Prince Edward Island passed an Act, 21 George 3, c. 15, expressly declaring that baptism of slaves should not exempt them from bondage. The notaries in the present case were Pinguet and Boisseau and the act was passed in the latter's office.

¹³ The purchaser here is the vendor Joseph de la Tesserie, Sieur de la Chevrotière, of the first transaction—he is also the purchaser in No. 9 *post*.

in money and 100 paid with two barrels (barriques) of molasses.¹⁴

The ninth is the sale, September 27, 1749, by Jean-Baptiste Auger, merchant of Montreal but then in Quebec, to Joseph Chavigny, Sieur de la Tesserie, of an Indian girl (une panise) of about 22 years of age named and called Joseph for baptism, price 400 livres, Island money,¹⁵ which the purchaser promises and agrees to send to be invested in pepper (?) and coffee for the account and at the risk of the vendor, Auger, by the first ship leaving Martinique for Canada, the pepper (?) and coffee to be addressed by the purchaser, de la Tesserie, to Voyer, a merchant at Quebec for the account of Auger. De la Tesserie hypothecates all his goods as security. The eleventh, November 4, 1751, is the sale by Jacques-François Daguille, merchant, of Montreal but then in Quebec, to Mathieu-Theodoze de Vitre, Captain in the Navy, of an Indian girl (une panise) about ten or eleven, called Fanchon but not yet baptized,¹⁶ price 400 livres cash.

The twelfth, September 8, 1753, sale by Marie-Josephe Morisseaux, wife and agent of Gilles Strouds of Quebec, then at Nontagamion, to Louis Philippe Boutton, Captain of the Snow,¹⁷ *Picard*, of an Indian girl (une sauvagesse panise de nation nommée Catiche) of about twenty years of age, price 700 livres payable on delivery, "with her clothes and linen as they all are."

The fifth, December 27, 1744, is a contract by Jean-Baptiste Vallée of Quebec, rue de Sault-au-Matelot, the owner of a Negro, commonly called Louis Lepage, whom

¹⁴ The notaries were Pinguet and Boisseau and the act was passed in the latter's office.

¹⁵ "Argent des Iles," West-Indian currency to be invested in Martinique. The notaries were Barolet and Panet and the act was passed in the latter's office.

¹⁶ See note 12 supra: The notaries were Barolet and Panet and the act was passed in the latter's office.

¹⁷ French "senaut," English "snow," a sort of vessel with two masts. The notaries were Sanguinet and Du Laurent; the act was passed in the latter's office.

Vallée certifies as belonging to him, and to be faithful and well-behaved. Vallée hires him to François de Chalet, Inspector General of the Compagnie des Indes to serve him as a sailor for the whole remaining term of de Chalet's tenure of the Ports of Cataragui (Katarakouye, *i.e.*, now Kingston, Ontario) and Niagara (on the east side of the river). The Negro is to serve as a sailor on the boats of the ports. Vallée undertakes to send him from Quebec on the first demand of de Chalet to serve him and his representative in all legitimate and proper ways, not to depart without written leave, etc. The amount to be paid to Vallée was 25 livres per month, de Chalet in addition to furnish the sailor a jug (pot) of brandy and a pound of tobacco a month, and for his food, two pounds of bread and half a pound of pork a day.¹⁸

The sixth act is a petition, April 27, 1747, to the Lieutenant Civil and Criminal of Quebec by Louis Parent, merchant of Quebec, asking him to direct Lamorille, Sr., and Jugon who had by judgment, April 25, 1747, been named as arbitrators, for the valuation of a Negro, named Neptune, part of the estate of the late Sieur de Beauvais, that they should proceed with their valuation — Chaussegros de Léry to be present if he wished, but if not, the two to proceed without him. A direction was given by Boucault to meet at his place the next day at 2 P. M. and a certificate by Vallet, the bailiff (huissier) to the Superior Council at Quebec, is filed that he had served Chaussegros de Léry, La Morille, Sr., and Jugon.

The first instance here recorded of sale of a slave after the Conquest by the British was November 14, 1778. This, the fourteenth document copied, evidences a sale by George Hipps, merchant butcher, living in his house, rue Sainte-Anne in Upper Town, Quebec, to the Honorable Hector-Theophile Cramahé, Lieutenant-Governor of Quebec, of a mulatto slave called Isabella or Bell about fifteen years

¹⁸ The notary was Barolet who signed the act as did Vallée, De Chalet, and two witnesses, Charles Prieur, Perruquier, and Jean Liquart, merchant.

old.¹⁹ She had been already received in Crahamé's house, and he declared himself satisfied with her. She had been the property of Captain Thomas Venture who had sold her at auction to Hipps. The price paid by Cramahé was £50 Quebec money, equal to 200 Spanish piastres; and Hipps acknowledged payment in gold and silver. Cramahé undertakes to feed, lodge, entertain, and treat the slave humanely.

The next, the fifteenth, April 20, 1779, is the sale of the same mulatto girl, Isabella or Bell, by Cramahé to Peter Napier, Captain in the Navy, then living at Quebec, with her clothes and linen for 45 livres, Quebec or Halifax money. Napier undertakes to treat the slave humanely.²⁰

The sixteenth, August 15, 1795, is the first written in English, all the preceding being in French. It is dated August 15, 1795 and is sale by Mr. Dennis Dayly of Quebec, tavern-keeper, to John Young, Esquire, of the same place, merchant, of "a certain Negroe boy or lad called Rubin" for £70 Halifax currency. Dayly had bought the

¹⁹ "L'esclave et mulatre nommée Isabella ou Bell, fille, âgée d'environ quinze ans, avec les hardes et linges à son usage." She is to obey her new master and render him faithful service. The price is expressed as "cinquante livres monnaie du cours actuel de Quebec, égale à deux cents piastres d'Espagne"—Fifty pounds Quebec currency equal to two hundred Spanish dollars. The word "livre" was in English times used for "pound." The pound in Quebec or Halifax currency was in practice about nine-tenths the value of the pound sterling.

The Ordinance of September 14, 1764, made one British shilling equal to 1s. 4d. Quebec currency, *i.e.*, the Quebec shilling was $\frac{2}{3}$ of an English shilling; the Ordinance of May 15, 1765, confirmed their valuation, making 18 British half-pence and 36 British farthings one Quebec shilling, but the Ordinance of March 29, 1777, made the British shilling only 1/1 and the British crown 5/6.

"The Seville, Mexico and Pillar Dollar" was by the Quebec Ordinance of December 14, 1764, made equal to 6/ of Quebec currency or 4/6 sterling; the Ordinance of March 29, 1777, equates "the Spanish Dollar" to 5/ Quebec currency (which was then substantially nine-tenths the value of sterling), *i.e.*, 4/6 sterling; the Upper Canadian Act of 1796 equated "the Spanish milled dollar" to 5/ Provincial currency or 4/6 sterling.

The notaries in the case were Berthelot Dartigny and A. Panet, Jr.; the act was passed in Cramahé's house, rue St-Louis."

²⁰ The same notaries appeared and the act was passed in the same place.

boy from John Cobham, of Quebec, September 6, 1786.²¹

The last, the seventeenth, is the most pleasant of all to record. John Young appeared, June 8, 1797, before Charles Stewart and A. Dumas, Notaries Public, in the former's office with the lad Rubin, and declared that he bought him from Mr. Dennis Dayly, August 15, 1795. He, as an encouragement to honesty and assiduity in Rubin, declared in the presence of the Notary, Charles Stewart, that if Rubin would faithfully serve him for seven years, he would give him his full and free liberty, and in the meantime would maintain and clothe him suitably and give him two and sixpence a month pocket money, but if he got drunk or absented himself from his service or neglected his master's business, he would forfeit all right to freedom. This was explained to Rubin, "who accepted with gratitude the generous offer." All parties, including the Notaries, signed the act, Rubin Young by his mark, so that the slave by good conduct and refraining from drunkenness would achieve his freedom, June 8, 1804.

I have discovered certain Court proceedings copied in the Canadian Archives at Ottawa,²² which have not been made public in any way and which are of great interest in this connection. A short historical note will enable my readers to understand the proceedings more clearly.

After the Conquest of Canada, 1759-60, for a few years the country was under military rule. The three Districts of French times, Quebec, Montreal, and Three Rivers, were retained, each with its Governor or Lieutenant Governor. To administer justice, the officers of militia in each Parish, generally speaking, were constituted courts of first instance with an appeal to a council of the superior officers

²¹ The notaries are A. Dumas and Charles Stewart; the act was passed in the latter's office.

²² See the latest Report of the Archives of Canada.

The Ordinance of General James Murray establishing Military Courts in Quebec and its vicinity will be found printed in Shortt and Doughty's *Documents relating to the Constitution of Canada*, pp. 42, 44. General Gage's Ordinance established them in the District of Montreal will be found in the publication of the Archives of Canada. *Le Règne Militaire*.

in the British Army in the city, this court having also original jurisdiction.

On July 20, 1762, a council sat, as of original jurisdiction, composed of Lieut. Col. Beckwith, Captains Falconer, Suby, Dunbar and Osbourne, to hear the plea of a poor Negro called André against a prominent merchant of Montreal, Gershon Levy. The proceedings, recorded in French, are somewhat hard to decipher after a hundred and sixty years have elapsed but well repay the labor of examination.

André asked to be accorded his liberty, claiming that Levy had bought him of one Best, but that Best had the right to his services for only four years which had now expired. Levy appeared and claimed that André could not prove his allegation, but that he (Levy) had bought him from Best in good faith and without any knowledge of the alleged limitation of the right to his services. Of course, Best could sell only the right he had and it became a simple question of fact. The court heard the parties, ordered André to remain with his alleged master until he had proved by witnesses or by certificate that he "had been bound to the said Best for four years only, after the expiry of which time he was to have his liberty."

The following year, April 20, 1763, the council sat again to hear the case. Lieut. Col. Beckwith again presided, and Captains Fraser, Dunbar, Suby and Davius sat with him. The parties were again heard and witnesses were called by André; but they were "not sufficient"—and "the Council ordered that the Decree of July 20, last, shall be executed according to its tenor; and in consequence, that the said Negro André remain in the possession of the said Levy until he has produced other evidence or has proved by baptismal extract or the official certificate of a magistrate of the place where he was born that he was free at the moment of his birth."²³ Although these

²³ It is to be observed that it was considered that *prima facie* the Negro was a slave. The same rule was applied in many states (Cobb, *Law of Negro Slavery*, pp. 253 sqq.), unless the alleged slave had been in the enjoyment of

courts continued until the coming into force of purely civil administration of justice, September 17, 1764, I do not find that André made another attempt to secure his liberation from the service of Le Sieur Gershon Levy, negotiant.

I am indebted to my friend, Mr. R. W. McLachlan, F. R. S. C., of the Archives of the District of Montreal, for a memorandum of the following sales of which a record exists in Montreal:

1784, December 16, James McGill of Montreal for and in the name of Thomas Curry of L'Assomption in the Province of Quebec, sold to Solomon Levy of Montreal, merchant, for £100 Quebec currency, a Negro man Caesar and a Negro woman, Flora.

1785, February 20, Hugh McAdam of Saratoga sends by his friend John Brown to James Morrison of Montreal, merchant, "a Negro woman named Sarah" to sell. "She will not drink and so far as I have seen, she is honest."²⁴

1785, March 9, Morrison sells Sarah to Charles Le Pailleur, Clerk of the Court of Common Pleas, for £36.

1785, January 11, John Hammond of Saratoga, farmer, freedom; but Chief Justice Strange of Nova Scotia and his successor Salter Sampson Blowers by throwing the onus upon the master did much toward the abolition of slavery in that province. See *The Slave in Canada*, pp. 105-108.

²⁴ I here copy the letter, *verbatim et literatim*, a delightful literary effort.
SARATOGA 20 Feby 1785.

Dr Sir,

I send by John Brown a Negro woman Named Sarah my Right & Lawful property—which you will Pleas Dispose of with the advis of your friends.—I have Wrote Mr Thomson on the same subjet—she has no fault to my knolage She will not Drink and so fare as I have seen she is honest—many many upertunities she has had to have shown her Dishonesty had she been so in Clined . . . I am sory to give you the trouble—She cost me sixty five pounds should not Lick to sell her under.—Should you not be able to get Cash you may sell her for furr of any Kind you think will sutt our market and send them down by the Return sladges; any trobl you my be at shall Pay for these.

I am Dr. Sir. Your

as hurede frind &c:

HUGH MCADAM

Mr. Morrison
mercht. Montreal.

As to a subsequent disposition of Sarah, see sale of June 6, 1789.

sold to Paul l'Archeveque dit La Promenade, gentleman, a mulatto boy called Dick, 6 years old, for £30 Quebec currency.²⁵

1785, April 26, sale by William Ward of Newfane, County of Windham, State of Vermont, to P. William Campbell in open market at Montreal of three Negroes, Tobi (aged 26), Sarah (aged 21) and child for \$425. These had been bought with another Negro, Joseph, a year older than Sarah, from Elijah Cady of Kinderhook, County of Albany, State of New York, for £250.²⁶

1789, June 6, James Morrison who had sold Sarah for

²⁵ It is possibly the same mulatto boy, Dick, the subject of the following Bill of Sale:

THUSBERRY octrs 19. 1785.

Know all men By these presents that I William Gillchres in the County of Rutland and State of Vermont, Yoeman for and in consideration of twenty pound Law Money to you in hand paid by Joseph Barrey of Richmond in the County of Cheshier in State of New Hampshier yeo man whereof I acknoledg the receipt and barggained and sold one molate Boy six years old named Dick to him the said Joseph Barney and his heirs for ever, to have and to hold the said molater boy, I said William Gillchres who for myself and my heirs promise for ever to warrant socure and defend said promise against the lawful claims or demand of any person or persons in which I have set my hand, hereunto, and seal this nineteenth day of October one thousand seven hundred and eighty-six, in the eleventh year of endipendency.

(Signed) WILLIAM GILLCHRES

Signed, sealed

in the presence of us

(Signed) ELISHA FULLAN

LUCY YEOMANS

On the back of this document were written thus the following words:

Novemer ye 15, 1786

Recevd the contents of
the within bill by me

Joseph Barrey

29 Nover 1786. .

Witness) Martin McEvoy
present)

John Carven

Gillchress

Bill of Morlato

Boy nd. Dick Gun

²⁶ I assume New York Currency, in which case the pound was 20 York shillings or \$2.50.

McAdam to Charles Le Pailleur, bought her for himself and sold her to Joseph Anderson of Montreal, gentleman, for £40.²⁷ The purchase from Le Pailleur is evidenced in French; it was for £36.

1790, December 23, Guillaume Labart, Seigneur, living at Terrebonne, sold to Andrew Todd, merchant of Montreal, a young panis called Jack, about 14 years of age, for £25.

1792, August 10, "Joshuah Stiles, late of Litsfield in the county of Birkshire, Massachusetts, at present in Montreal," sold to Daniel Carberry of Montreal, hair-dresser, a Negro boy named Kitts, aged 15 years, for the sum of one hundred and fifty dollars each of the value of five shillings Halifax currency.

1793, July 11, Jean Rigot, master hair-dresser, living on Boulevard St. Antoine, sold a mulatto slave boy, Pierre, aged 16, to Sir Charles Chaboille, merchant of the Upper Country (*i.e.*, Niagara, Detroit, Michillimackinac), for \$200 Spanish, each worth s.5 Halifax currency. Rigot had raised the boy from infancy (*l'ayant élevé de bas age*).

1793, July 27, William Byrne, formerly captain in the King's Royal Regiment of New York, in a letter of May 29, 1793, having promised his adopted son, Phillip Byrne, on his marriage to Mary Josephine Chêne, daughter of Charles Chêne of Detroit, to give him a Negro boy, Tanno, aged 16, and a Negro woman, Rose, aged 28, carried out his promise by Deed of Gift, July 27, 1793, but he stipulates for "half the young ones" !!

1795, December 15, François Dumoulin, merchant of the Parish of Ste. Anne, Island of Montreal, sells to Meyer Michaels, merchant of Montreal, a mulatto named Prince, aged about 18, for £50.

1796, November 22, John Turner, Sr., merchant, sold to John Brooks, a Negro man named Joegho, aged 36, for £100, Quebec currency, and a Negro woman, Rose, aged 25, for £50.

1797, August 25, Thomas Blaney (attorney for Jarvis

²⁷ 1787, January 10, George Brown and Sarah a Negress were married by Cave—it was probably the same Sarah.

George Turner, a soldier in the 2d Batt. Royal Canadian Volunteers) and Mary Blaney, his wife, sold to Thomas John Sullivan, tavernkeeper, a Negro man named Manuel, aged about 33, for £36.²⁸

1781, August 9, sale per inventory of the estate of the late Naethan Hume, "one pany boy, Patrick, sold to McCormick for £32."

Perhaps this paper may well close with the following:

1781, October 31, a Negro, named York Thomas, a free-man, indentured himself for three years to Phillip Peter Nassingh, a Lieutenant in his Majesty's 2d Battalion, New York, for and in consideration, the said Nassingh to provide the said servant with meat, drink, washing, lodging, and apparel, both linen and woolens, and all other necessaries, in sickness and in health, mete and convenient for such a servant, during the term of three years and at the expiration of the said term, shall give the said York Thomas, one new suit of apparel, above his then clothing, and £6 Halifax currency.

WILLIAM RENWICK RIDDELL

OSGOODE HALL,

Toronto, Dec. 23, 1922

²⁸ While this was in fact and in law a sale, the transaction was far more than a mere transfer of property: The Notary John Abraham Gray has the Notarial Act No. 74 which shows that Manuel, the negro man voluntarily engaged as servant, to Thomas Sullivan, under the usual conditions of servitude, for five years, at the end of which term, the said Manuel, if he should faithfully carry out his said engagement was to be emancipated and set at liberty according to due form of law, otherwise he was to remain the property of the said Sullivan.

A Notarial Act now in the possession of the Historical Society, Chicago, dated at Montreal, August 15, 1731, passed before the Notary Charles Benoit et St. Désiez, evidences the sale by Louis Chappeau to Sieur Pierre Guy merchant, both of Montreal, of an Indian lad of the Patoka nation, aged about 10 or 12 years, for 200 livres paid in beaver and other skins. See *Report of Canadian Archives*, 1905, vol. 1, lxix.

It may be of interest to note that on pp. 476, 477 of the same report is copied a memorial (October 29, 1768) of the inhabitants and merchants of Louisiana in which they complain, *inter alia*, of D'Ulloa the Spanish Governor of Louisiana (1766-8) forbidding "the importation of negroes to the colony under the pretext that this competition would hurt an English merchant of Jamaica who had sent a vessel to D'Ulloa to confirm the contract for the importation of slaves. In creating this monopoly, he had robbed his new subjects of the means of procuring slaves cheaply. . . ."

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No. 9

Cases Reported this Week

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| SUPREME COURT. VOL. C (65 Bull. Supp.). | S. & C. P. COURTS. VOL. XXXI. |
| Fowler v. Cleveland | 75 Baker v. Burke Co. 77 |

Digest of this Number

DAMAGES—

No rent or damages for injuries to automobile can be deducted from consideration paid on disaffirmance of contract and tender back of machine by an infant. Baker v. Burke Co. 31 Dec. 77.

INFANTS—

No rent or damages for injuries to automobile can be deducted from consideration

paid on disaffirmance of contract and tender back of machine by an infant. Baker v. Burke Co. 31 Dec. 77.

MUNICIPAL CORPORATIONS—

Rule of respondeat superior applies to injuries caused by negligence of fire department. Fowler v. Cleveland, 100 O. S. 000; 65 Bull. Supp. 75.

Ohio Citations this Week

| | |
|--|--|
| Bell v. Cincinnati, 80 Ohio St. 1. Distinguished, 100 O. S. 000; 65 Bull. Supp. 91, fire departments. | Followed, 31 Dec. 79, damages. |
| Cincinnati v. Cameron, 33 Ohio St. 336. Distinguished, 100 O. S. 000; 65 Bull. Supp. 93, fire departments. | Overholser v. National Home, 68 Ohio St. 236. Distinguished, 100 O. S. 000; 65 Bull. Supp. 93, fire departments. |
| Finch v. Toledo (Ed. of Ed.) 30 Ohio St. 37. Distinguished, 100 O. S. 000; 65 Bull. Supp. 94, fire departments. | Raudabaugh v. State, 96 Ohio St. 513. Distinguished, 100 O. S. 000; 65 Bull. Supp. 92, fire departments. |
| Frederick v. Columbus, 28 Ohio St. 124. Overruled, 100 O. S. 000; 65 Bull. Supp. 75, respondeat superior. | Western College v. Cleveland, 12 Ohio St. 375. Distinguished, 100 O. S. 000; 65 Bull. Supp. 91, fire departments. |
| Lemmon v. Beaman, 25 Ohio St. 105. | Wheeler v. Cincinnati, 19 Ohio St. 19. Distinguished, 100 O. S. 000; 65 Bull. Supp. 91, fire departments. |

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16432. State, ex rel. Samuel Doerfler, Prosecuting Attorney, v. John G. Price, Attorney General. In Quo Warranto.

WANAMAKER, J.

1. The grand jury in its inquest of crimes and offenses, and in its finding and presentation of indictments to the court of common pleas, does not exercise a judicial function. It only acts as the formal and constitutional accuser of crime and those it believes to be probably guilty thereof.

2. Neither the attorney general nor the prosecuting attorney in connection with his official services relating to the grand jury exercises any judicial function under the present statutes of the state of Ohio, especially Section 13560, General Code, as amended in 1919.

3. The Constitution of Ohio, especially Section 1 of Article III, makes the attorney general one of the executive officers of the state of Ohio. In the exercise of the police power of the state, the general assembly of Ohio may delegate to him any such legal, administrative or executive duties as it deems best and which are not otherwise delegated by the constitution.

4. An act of the general assembly authorizing the court of common pleas, upon written request of the attorney general, to order a special grand jury, as provided in said Section 13560, General Code, is a valid and constitutional exercise of the police power.

5. The prosecution of crimes and offenses for the violation of the criminal laws of the state of Ohio is a state function and not a county or municipal function. It calls for the exercise of the state police power, in which county officers have only such powers as may be delegated to them by the general assembly.

6. The several counties of Ohio, as political subdivisions of the state may be called upon by the general assembly of Ohio to aid any of the executive officers of the state, in any manner that the general assembly shall deem best, in the exercise of the police powers of the state, particularly in the investigation and prosecution of crimes and offenses.

Judgment affirmed.

Nichols, C. J., Jones, Matthias, Johnson, Robinson and Merrell, JJ., concur.

General Docket—Cases Decided.

16284. Ohio Fuel Supply Co. v. Mary E. Shilling. Error to the court of appeals of Wayne county. Judgment reversed,

cause remanded. Jones, Matthias, Johnson, Wanamaker and Robinson, JJ., concur.

16388. Higbee Co. v. Walter Jackson, an infant. Certified by the court of appeals of Cuyahoga county. Judgment affirmed. Nichols, C. J., Matthias, Johnson, Wanamaker, Robinson and Merrell, JJ., concur. Jones, J., dissents.

Motion Docket.

10368. Helen B. Smeck et al. v. Frank Tallmadge et al. Motion for an order directing the court of appeals of Fairfield county to certify its record. Overruled.

10382. Fred W. Baird et al. v. Joseph F. Cunningham, Extr., et al. Motion for an order directing the court of appeals of Perry county to certify its record. Overruled.

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Saviers v. Smith, decided January 20, 1920, by Judge Kinkead of the Franklin common pleas, holding the new automobile law, so called, constitutional is now available for publication. The court holds: (1) An act of the general assembly entitled an act "providing for the levy and collection of a tax on the operation of motor vehicles on the public roads, highways," etc., and providing in Sec. 6291 G. C., that "an annual license tax is * * * levied" in passenger and commercial cars according to power, use and weight for the purpose of paying the expense of administration and maintaining and repairing of public ways, to be collected by the state and apportioned one-half to the "state maintenance and repair fund" and one-half to county and municipal taxing districts from which the taxes come for repair of public ways and for no other purpose or subject to transfer to other fund, is constitutional. (2) The state, having plenary powers over public highways and streets, may subject their use to reasonable conditions and restrictions such as exacting excise or privilege taxes on motor vehicles to secure compensation for use of facilities provided at great cost, from the class for whose

needs such special facilities are essential and whose operations over them are peculiarly injurious. (3) An assessment on motor vehicles, based on the horsepower, use and weight of the vehicle, the proceeds of which are to be used for exclusively state, county and municipal highway, road and street maintenance and repair, is in its nature a toll for the use of such public ways and may be denominated an excise or privilege tax. (4) A privilege or excise tax is not assessed primarily for general revenue, but has express relation to the privilege, and only incidentally operates to the general state revenue in the specified instances. (5) Owners of automobiles do not have an inherent, absolute right to use the public roads, highways and streets; they have a common right to use such highways, but such right can only be exercised subject to regulation by the state which is the primary and paramount owner and proprietor of all roads and streets.

WHAT IS THE BRITISH EMPIRE?

An Address before the Ohio State Bar Association, at Dayton, Ohio, January 23, 1920, by the Honourable William Renwick Riddell, LL. D., F. R. S., Can., &c., Justice of the Supreme Court of Ontario.

In 1774 the Quebec Act established a vast Province of Quebec whose boundary ran along Lake Ontario and the Niagara River, then along the south shore of Lake Erie as far as the western line of Pennsylvania, then south along that line to the Ohio, down the Ohio to the Mississippi and northerly to the Hudson Bay Company's land. Thus the territory now the State of Ohio and the Province of Ontario was all in one Province and the people few in number of that could visit those still fewer in this without leaving their Province or coming under another flag.

Now through the stupidity—and worse—of a half insane King and his unwise advisors, you and we have a different allegiance, a different flag; and when one

visits the other an international line must be crossed.

But a man of Ohio does not feel himself a stranger or an alien when he comes to my Province and most assuredly I do not consider myself a stranger or an alien in Ohio. I feel among brethren whom no difference in political allegiance can divide from me in the allegiance we have in common to the ideals of the English speaking world.

With the cordial approval of your officers I have selected for the subject of my address "What is the British Empire?" because I am wholly convinced that it is no less true than it was a century ago when the American Ambassador Richard Rush said it—"Let the peace between the United States and England be broken and the arch which supports the peace of the world falls in ruins."—or when General Jackson who never feared the face of man, who quailed not nor varied a hair's breadth at any outcry, said in December, 1832, that it was for the interest of both parties to preserve inviolate the good understanding then existing and thought that the two peoples were "cemented by a community of language, manners and social habits, and by the high obligations we owe to our British ancestors for many of our most valuable institutions and for that system of representative government which has enabled us to preserve and improve them."

There never was a time in the history of the world when it was more important that the English speaking peoples should stand together, should understand each other, should appreciate the principle and objects of each other.

The whole civilized world is shell shocked, is living a nonnormal life, the nerves aquiver and the sensibilities abnormally acute—there are those who talk as lightly of war between the United States and Britain as of a summer excursion and apparently more than half believe in their words.

It has been for years my pleasant avocation to make your people better known to ours and our people better known to yours, feeling and knowing that the more the English speaking peoples know of each other the more they will recognize that they are the same in all that is worth considering.

I should say in advance that I do not propose to discuss the case of Ireland and her anomalous condition—not because I fear to express my views fully and frankly—but because Ireland is still in a highly controversial state and because it is practically impossible to discuss her without rousing passion and resentment on the part of one section or the other of her sons. They love her so well that the love is more than a

sentiment, it is even more than a passion, it is a religion. It is idle to argue against a fixed opinion in the case of Ireland as against a tenet of the Christian faith; and no good end could be attained by my attempting to set forth my views—I offer no panacea for her troubles. Let me however, say this—that the peace and happiness of the English speaking world depends in no small measure upon the success of those upon whom the duty is cast, in composing difficulties and in making Ireland happy and content. Please God they may succeed.

Thinking over how I should begin my address I read an article by an American writer in which he said "The most important situation that faces the people of the United States is not the financial situation, is not the labor situation, is not the cost of living, is not the social unrest. The most important situation that faces the people of the United States is the political situation and the reason that is true is because every other situation, every other condition, every other phase of American life depends on and is entirely subordinate to and corollary of the political situation. The most important problem the American people have to deal with is the election of the right man as President of the United States in 1920.

Everything stands back from that, everything entails upon it. It transcends all such perplexities as the League of Nations, the internationalism of our policies, the question of taxes, expenditure, precedents and performances. It means either the new day if the right man is chosen or the old night if he is not. It is essential. It is paramount. The four years that will have elapsed when President Wilson's term expires on March 4, 1921, however momentous, are negligible when compared with the four years that will begin on that date, because those four years will spell either affirmation or negation of the benefits and constructions that are generally held will be the outcome of the war in the way of a reorganized and humanized conduct of life and the employments and pleasures and perquisites thereof.

Given the right man in the White House, the new day will dawn because all the conditions prerequisite to that dawning are undeniably at hand and need but the proper influencing ability. Given the wrong man, he will be a modern Joshua, who will not only command the sun to stand still but will go far beyond his Biblical prototype, and will, by his ineptitudes and his previously contracted entanglements and his partisanship, prevent the sun from coming up at all. The legislative branch

of the Government often asserts its prime importance in our national scheme, and from time to time we hear similar assertion from the judiciary; but the fact remains that, whatever the ideas of the fathers may have been as to coordinate and equal powers, the President of the United States is the most important man in the United States in regard to his relation to the progress of the country; and, more than that, the President of the United States from March 4, 1921, will be not only the most important man in the United States, considered nationally, but the most important man in the world, considered internationally. This country is coming close to making or breaking in the next five years.

Any person at all cognizant with American affairs, and of even rudimentary appreciation of present-day conditions, should know that the forthcoming year in this country, with Mr. Wilson as President, will be a formative year and that one of two results must ensue. Either Mr. Wilson will administer wisely with a view to the future, and make his plans and policies and executions to that end, or he will not. If Mr. Wilson does, the importance of the man who follows him will rest in the continuance of those policies as they may affect us. If Mr. Wilson does not, the double importance of the man who follows him will come in his opportunity to make the necessary rectifications. In any event, Mr. Wilson will be President until March 4, 1921. That is a situation that is determined, but the United States will require administration after he retires—if that event comes to pass in 1921—and the conditions that will be precedent on March 4, 1921, will be tremendous in their bearing on our future national health." [Samuel G. Blythe in the Saturday Evening Post, January 3, 1920.]

Cur non ridetis?

If I were to quote an article anything like that in Canada—substituting "the King" or "the Governor-General" for "the President," and "Britain" or "Canada" for "the United States"—my hearers would set their face to the preliminary smile and wait for the inevitable joke—and the more serious I appeared the broader the smile.

For the outstanding feature of the British Empire is that it is not an Empire at all.

You all remember that the "Holy Roman Empire" was not holy. It was not Roman, and it was not an Empire—"the British Empire" is not quite so glaring a misnomer for it is British (and please God will remain British)—but it has no Emperor, no one with the Imperium. True it is that the gorgeous orien-

talism of Disraeli aided perhaps by the vanity of an aging woman, has fastened upon our King the title "Emperor of India," but that is only in India and it plays no part in practical life even there. We have no scowling Hohenzollern to tell us—"There can be but one will in this land and that is mine—him who opposes me I will crush." If a Prince of the British Empire were to talk that way he would be put in the lunatic asylum without delay or at least placed in charge as was the unfortunate George III.

In the old charters the King is often called "Imperator" and "Basileus"—in some statutes the word Empire appears, e. g., in the Statute of 25 Henry VIII, c. 28 his realm is declared an Empire and his crown Imperial but that only means that he is as big a man and his Kingdom as important and Great a power as any Emperor or Empire in Christendom or out of it—this Act was before the times when the English had adopted as their maxim "Blessed are the meek for they shall inherit the earth." But then Washington, Jefferson, Marshall, habitually spoke of the Empire of the United States.

Yes, there is a King whom we honour, a King "by the Grace of God" as the official title runs—and the Kaiser was no more than that; but he took the title seriously. It is hard for some Americans to understand the actual political state of British countries because Americans have a written Constitution which means what it says and all one has to do in order to understand it is to find out the precise meaning of the language employed—if there be not an agreement as to the meaning the Supreme Court is ready to give an authoritative interpretation. But in a British Constitution one may be quite certain that the words employed do not express the true meaning—we are in such matters past masters in the gentle art of camouflage.

So when the King is said to be King by the Grace of God, we really mean that he is King by the grace of an Act of Parliament.

England once had Kings by the Grace of God, who presuming on their supernatural mandate played such tricks before high heaven as caused one to lose his head and another his throne. The Old Land had had enough of that kind and brought in another King who knew his place: finally when he was dying without a child, Parliament settled the succession in 1700 (12. 13 Wm. III, c. 2). If in the future there should be need, the people of the British Isles are as competent today as they were two hundred years ago to rearrange the succession—no one who knows the sound common sense of the present Royal

family will think that any such need will ever arise. The right of the House of Windsor to the Crown rests solely on the Acts of Settlement and resolves itself into the sovereignty of the Legislature: we have therefore abundant security that no Prince of this House will ever countenance the silly theories of hereditary right which flattery and superstition on the one hand and insufferable arrogance on the other rendered current but the other day in Central Europe. The executive is the King: all executive acts are in his name: his is the Army, his the Navy—and he cannot appoint so much as a drummer boy! The shades of the old Henries, of the Virgin Queen, would shudder at the sight—yet the traditional terminology continues to be employed—the King commands and the King is obeyed in words and in form. The King can do no wrong: he can do nothing—except through a minister and the minister must take the blame or the credit of the act.

The King has all the British world to choose from for his Ministers—as the Presidential Electors have all the many millions of American-born citizens of thirty-five years of age who have been for fourteen years resident in the United States to choose from for the President. This is almost the only bit of camouflage in the Constitution of the United States and it was intended to be a reality. How beautiful the theory!—the citizens of each State after careful and prayerful thought select a number of the most competent and most trusted of their fellows to join with others similarly elected from all the other States—and these wise and patriotic men taking a minute survey of the whole Union, select as the President the man most fit for that high office from his attainments, experience and character. In fact—the voting citizens seldom care a straw about who the electors may be, whether they are wise or foolish, knowing perfectly well that when they vote for this or that elector they are voting for this or that man as President. If in 1916, the Presidential Electors had to a man believed that Mr. Taft or Colonel Roosevelt was the very best man for the Presidency, neither of these would have stood any more chance of receiving the vote than I have of being called to be Prime Minister of Britain—More, if either had been declared elected he would not have accepted the position. Why? There is nothing in the law, in the letter, in theory, to prevent: but it is not done, it is against the

spirit of the institutions of the land!

Every British minister must be acceptable to the House of Commons elected by the people—the King may choose but he must choose as he is told. The President of the United States must choose a minister acceptable to the Senate which is now of course elected by the people (for the most part): but once the Minister is approved and his appointment confirmed, he passes from its immediate control. In England the minister must continue to be acceptable to the House of Commons: when he ceases to be so acceptable he must get out. The British Minister is responsible to the House of Commons, the American Minister to the President. Accordingly the King is not in politics—it is quite generally understood that the President is—and as a consequence, both peoples being wholly satisfied with their institutions, while no American would change the Presidency as an institution, millions would if they could, change the President: but there being but an unimportant and negligible fraction of the British world who would abolish the Kingship, there is not one person who would change the King.

It was said in the times of King Edward VII, that were Britain to become a Republic he would receive a unanimous vote as President—King George is equally beloved because he thinks of the people all the time and does not interfere with the business carried on in his name.

There is no analogy between the King and the President—there was once; and of course the functions and power of the President were originally framed from those of the King and in great measure imitated them. One has increased and the other decreased while both have maintained their former outward form—Camouflage again: the President is vastly more like an Emperor, he has more Imperium than any British Sovereign for a century.

¹Last evening I was entertained at dinner by a number of eminent lawyers of this State. The conversation turned on the coming Presidential election: the Democrats eliminated as a successful candidate every Republican whose name was suggested and the Republicans showed that no Democrat could hope to be elected. I asked "Why not take the Constitutional method, elect a number of first class men and let them select the President? Surely that is the theory of the Constitution?" They almost simultaneously and quite unanimously cried—"That is the Theory" and let it go at that. Such contempt for the written constitution I never saw—it was shocking.

²Mr. Elihu Root has just evoked applause at a party convention by speaking of the present administration thus:—"A Government with a Louis Napoleon at one end and a plebiscite at the other with naught but subservience between is not a free Republic—it is autocracy by consent." *Tantaene coelestibus irae!*

For those who seek analogy, the nearest analogue to the President is the Prime Minister. The Prime Minister is found by an irregular process of evolution, selection, elimination, assertion, abnegation, from one party or the other: he selects his colleagues—the difference between the Prime Minister and any other Minister is that if one must leave the Administration, it is not the Prime Minister—and so long as he can command a majority in the House of Commons he is safe: an adverse vote of the House seals his fate unless by a new election he can get a majority.

But the Prime Minister is never sure of his place. When Lloyd George was engaged with Mr. Wilson and others in settling the affairs of the world at Paris, he was forced to keep an anxious eye on the Islands and more than once to cross over to "look after his fences"—not as that phrase is generally understood in the United States, for the fences which he had to watch were not to keep out intruders on a future crop but to keep out those who were after the existing corn. President Wilson on the contrary could calmly proceed on his way with a smiling consciousness that nothing could move him from his place but an impeachment or death—The latter would probably be a happy lease after Poland, Bela Kun and Fiume, and as to impeachment he could say "If they couldn't unseat Andrew Johnson, no one need fear."

It would seem from what was said in the United States that there were some Americans at least who would have removed him if they could by any means short of a club—the Constitution forbade anything else and the criminal law forbade the club so that Mr. Wilson could say "j'y suis, j'y reste."

But on the other hand there is no room in a British country for a continued performance such as that on the boards at Washington. Had Mr. Wilson been a British Prime Minister he would have used a short and easy method with recalcitrant Senators: when he found that the Senate were not going to approve the Treaty—*cujus pars magna fuit*—he would have "sent them to the country" that is called an election with that as the issue and settled the matter in a few weeks. Apparently he and some of his opponents desire the next election to be fought on the Treaty as the issue—but there is no human power by which such an election can be speedily held—and when the election is held its results will last far longer after the final disposition of the Treaty.

Which of the methods of government is the better or whether either is the better, must depend on opinion—both

peoples are satisfied on the whole and I have no faintest trace of missionary or proselytizing spirit. With Burke I say "If you ask me what a free government is I answer that it is what the people think so and that they and not I are the natural, lawful and competent judges of this matter." One's own geese are generally swans and some people prefer pork to partridge.

Then there is the House of Lords, a relic of feudalism and mediaevalism: that House has in the past been at times a detriment to the British world—but now its teeth are drawn, and it is under proper discipline. No longer able to foil the people's will, it affords an admirable retreat for the aging statesman, a forum for calm and unselfish discussion untroubled by fears of an unfavorable vote at the next election.

Yet speaking for myself alone, I think the House of Lords an anomaly constituted as it is. Because James Bryce or John Morley is an admirable and ideal legislator it by no means follows that if either had a son, that son would be as good. When the two Canadas were offered the chance of having hereditary legislators in their Upper House, they did not avail themselves of it.

While the House of Lords is by no means negligible, it cannot control the House elected by the people. It was not until the Reform Act in the fourth decade of the last century that the people of the British Isles could fairly be said to govern themselves—the membership of the House of Commons was determined by the aristocracy, the church, the upper classes. But great strides have been made since that time: and now while manhood franchise is not formally recognized, practically every-

By the Canada Act or Constitutional Act of 1791, 31 Geo. III. c. 31 which provided for the government of the two Provinces of Upper Canada and Lower Canada into which the former Province of Quebec was divided the same year, it was enacted that it should be allowed that the Crown upon creating any hereditary title or honor might annex thereto the hereditary right of being summoned to the Legislative Council the Upper House. This enactment, far as I am able was unique in colonial Chartered and never was acted upon. We have in Canada long received hereditary titles and now we have revolted against titles altogether. We seek equality as our neighbors to the south in Great Massachusetts, Senior Wardenships and the like—and we have a splendid crop of Honorary Colonels and Noble Graces, Grand Masters Workmen et hoc genus omnia that so man and member—"marvelous alike without number."

Sir George Reid tells us in his Recollections that when the constitution of New South Wales, Australia, was under consideration, it was suggested that the Senate House should be hereditary like the House of Lords but this received no support. No British country will have anything to do with hereditary rulers and the Mother Country tolerates them for historical reasons but they can go "only so far."

one who desires a vote can have it—owners, tenants, occupants of land or houses, even lodgers if they furnish their own room, and all women thirty years of age⁴.

The recent triumph of the American-born Viscountess Astor made known to all the world that a woman can sit and vote in the House of Commons—the House of Lords continues archaic and does not admit women yet and why any woman would want to sit in that Chamber may be difficult to discover⁵.

Perhaps the reason and the reasonableness of a remark by the Prince of Wales on his recent visit to the United States are not obscure. He said to Americans on claiming Kinship—and having the claim allowed—"Your ideals are as democratic as ours." The young man, a true Prince Charming, as different from the arrogant Prussian Prince by the Grace of God as day from night (Could you ever think of him chattering Grace of God rubbish?) spoke half in fun, but whole in earnest—for he knew—as I assert—that Britain as now constituted is as democratic a nation as exists on the face of the earth.

What is democracy? I have elsewhere said:—"Self-government is Democracy—whether the form be monarchical, republican, what you will, the vesture is naught, the soul is what counts and here not seldom "the letter killeth but the spirit giveth life." What is called a Republic may be a mere oligarchical tyranny. What was Republican Athens or Rome? What the mediaeval Republics of Italy? What some of the so-called Republics even in modern times of South and Central America?

Democracy is not a form, it is a vital principle manifesting itself in many ways, under as diverse shapes as life itself. We may be puzzled sometimes to define it, we can never fail to recognize it where it exists, to miss it where it is not.

I am not one of those who believe, or pretend to believe, that democracy was born on the fourth of July, 1776, and that her birthplace was upon this continent. I do not believe, nor do you believe, that liberty was unknown and non-existent before the Declaration of Independence. With a thorough appreciation of the importance of the elements

of the population of the Thirteen Colonies, deriving from Scotland, Ireland and Holland, not shutting my eyes to the great part played by these in the political and industrial development of these States, not losing sight of the valuable Scandinavian immigration or of the German factor—if it is not prohibited in the present prefrivd state of public opinion to so much as mention the German—having no drop of English blood in my veins, no pride of English ancestry—I do not hesitate to say that the source of the American as it is the course of the Canadian conception of liberty and democracy is England—not indeed the ultimate source, but the immediate source whence the stream flowed to the Colonies.

The ultimate source lies far removed from the trodden path of civilization—not in Rome, not in Greece, still lies in Babylon or Persia but in the bleak cold fens and the dense forest of north-western Europe where Angle and Saxon and Jute maintained their proud independence and alone of all the nations refused to bend the knee to the Imperial Mistress of the world. When they crossed the North Sea they did not change their nature.

Perhaps because insular, the sturdy Englishman never quite lost his sense of personal freedom, Norman and Plantagenet and Tudor and Stewart did their worst but the instinct for liberty survived all assaults. The Great Charter declared the freedom of the subject of high station only but it contained as in solution the freedom of all; one Stewart must be slain to show that the King is after all but a public servant, another lost his throne to prove that the public servant must not too much try his master.

The Bill of Rights is 1689 laid down principles of democracy in systematic form; and democracy was well advanced before George Washington was born. Freedom of speech; freedom of the press; freedom of assembly and petition; no taxation without representation; no gift or benevolence to the king unless made by a free Parliament freely elected by a free people and debating freely; these principles the Fathers of the American Revolution brought with them, either in person or by their ancestors, to this continent. It needed but a series of sensible and sympathetic monarchs, or even one such monarch, to have democracy fully developed in England before the American Revolution. Unfortunately near the end of the eighteenth century a pig headed, half-crazed, ill-trained, ill-balanced Hanoverian, educated by a foolish German woman, whose voice he never forgot, "George be a king, George be a king;"

⁴This will almost certainly be remedied but in the mean time it is not so fatal as it would be on the other side of the Atlantic—no self-respecting American or Canadian woman is ever more than 27 until she is 60—her *salto dos pas perdus* is never less than 33 years long—apparently this peculiarity is not shared by their British sister.

⁵It is curious but it is a fact that I have found more admirers and defenders of the House of Lords in the United States than in Canada or even in England.

in the providence of God and by the accident of birth and religion, came to the throne of the Kingdom, and believed he had been sent by God to govern not only the islands but also this continent.

The Colonists of the Thirteen Colonies did not desire to leave the British Empire—none more loyal than they—but they did desire and were determined to govern themselves—and when it came to the point where they had to choose between governing themselves and continuing part of the British Empire, they did not hesitate long. Self-Government was theirs and they determined—even though it meant leaving the British Empire—they determined to govern themselves. The Colonists were advancing no new doctrine; they were but applying to their own case the principles which they had brought with them across the ocean. But it is their immortal and never fading glory that they cast into the scale their fortune and their lives; and that after a weary and perilous struggle, they emblazoned, sun clear, as in the skies, the principles of democracy, never again to be obscured.

The people of the old land awoke to their state and they, too, asserted their right to self-government and after many a struggle, many a heart breaking failure but many a splendid victory, they now are abreast of any nation, monarchical or republican—and in advance of most.

The old imperial forms continue, the old *façons de parler*, ceremonies, courtesies, what not—we English speaking folks are not quick to change; anything which works fairly well and does no harm is likely to be left alone, *quædam non moveo*—on the back of our letters we write "John Smith Esq." though neither John Smith nor any of his forbears ever was an esquire but his "ignoble blood has crept through scoundrels ever since the Flood" while within we address as "My Dear Sir" one whom we detest and are "Your obedient servant" or "Yours sincerely" of him we despise.

A Frenchman will fight a duel or half a dozen at dawn over a principle, a German with what he considers true German calmness and solidity will foam at the mouth and shriek at the top of his voice over something he has evolved from his own consciousness but we English speaking peoples refuse to get excited over forms if the substance be satisfactory. The proof of the pudding is the eating of it and not its shape or whether it conforms to ideal conceptions of perfection or elegance.

So long as the Electoral College continues to elect the man that it is expected to elect so long it will remain, although its practice contradicts its

theory; but let it once go astray and it will have short shrift; it will be scrapped; so long as the forms and ceremonies of the Old Land do no harm they will be let alone, if and when they are noxious they will be ended.

The British Empire is not however contained in the British Isles. Three quarters of a century ago the great Daniel Webster spoke of that Empire as "a power to which Rome in the height of her glory is not to be compared—a power which has dotted over the surface of the whole globe with her possessions and military posts, whose morning drum beat following the sun and keeping company with the hours circles the earth with one continuous and unbroken strain of the martial airs of England." "What do they know of England who only England know?" The King is King not only of the United Kingdom but of the British Dominions beyond the Seas, and I am now to speak of these.

The German says that Britain's soul is financial, that she lives for trade, she fights for trade and if she must die she prefers to die for trade—like as in the old gibe of Napoleon who called the British a nation of shop-keepers. The German is not wholly wrong; he sees as through a glass darkly or rather as through a glass distorted—one looking through a colored glass window of a church sees something of what passes without but sees it disconnected, out of proportion, with the wrong colour, shape, action; the general direction of movement, however, is plainly enough discerned that a reasonably clear judgment may be formed of it. The German is not wholly wrong—with that queer mentality of his so hard for us to understand, he has some glimmer of reason; and he is right in believing that the direction in which Britain has gone in colonizing has enormously increased her trade—and he is right in believing that on the whole she has desired trade and has colonised that she may have more and more trade.

It is true that some of the Puritans sought leave of Queen Elizabeth to settle in that land "which lieth to the West," their object being to settle in Canada and greatly annoy the bloody and persecuting Spaniards in the Bay of Mexico and it is also true that the

we have often constructed in thought the difference in our conduct in the political and the industrial field: in the latter let a new machine be invented more effective, more speedy, and the old however costly be scrapped ruthlessly and without delay. Perhaps competition in the commercial arena is almost none in political matters, and what little there is is obscured by national prejudice misdirected patriotism. Thomas W. Jefferson, "The History of the Thirteen Colonies of North America 1497-1763" London, p. 78.

"Pilgrims" and the "Puritans" of New England came to this Continent to be let alone to live their life in their own way; but on a broad view it will be seen that England's motive was not religious persecution or seclusion from the current of human life—much less was it the glory of a conqueror. Love of Mother Church and of martial renown may have inspired the French settlement of Canada—a certain amount of missionary feeling actuated the Spaniard in his extraordinary career of conquest; England's heroes may have talked—they did talk—on occasion, of crushing the papist and the pagan, of the glory to be won by conquering the Spaniard, the Frenchmen or the Indian—but that was largely camouflage—what they wanted was trade. Business colonization is of course scorned by the nobility, a mere merchant is bourgeois—but I for one have no shame in admitting that most of Britain's possessions have come about in the way of business. How seldom do we realize that the great humanizing agency of the world is trades.

For a time England imagined that her sons who left her shores for a new land should receive their orders from those who were left behind; she wholly failed to recognize that the emigrants were still part of the nation—she had spent money like water in planting, in watering, in defending her Colonies, and she supposed that having paid the fiddler she should call the tune—and that she could make those who had enjoyed the tune help to pay as she should direct.

The American Revolution came a terrible awakening; England learned that those of her blood or of her principles must govern themselves whether for good or for ill. To my mind it is the veriest triviality to base the Revolution upon a tax here, an impost there, a stamp, a duty—all these were superficial and the essential thing was that the Colonists were determined to govern themselves.

Britain has her wisdom; she did not require two lessons of the same kind—and I say with the utmost deliberation, the utmost emphasis of which I am capable that after the American Revolution, the whole scheme of Colonial Administration has been founded on a desire that the Colonists should have the full extent of self government of which they might be capable, a liberty equal to that of citizens of the United States.

I have spent days, even weeks in the perusal and careful study of the official correspondence between the Home Ad-

ministration and the Colonial Governors and other officers; and I am wholly satisfied with the accuracy of my statement just made—there are here and there reactionary movements, here and there statesmen or politicians who do not understand or who forget—but taking the whole, the obstacle in the way of perfect political and economic liberty has not been at Westminster but in the Colony. And while it is not to be expected that the American Union should be held up as a model, there are every now and then hints which indicate that the Republic was always kept in mind.

I do not propose to take up your time in discussing the history of the progress of Responsible Government: I am not concerned with what the British Empire was or might have been, but with what it is. Now for the Colonies. What are the Colonies? the outstanding fact is that they are not Colonies. The Greek Colony was sent out sometimes to increase the glory and might of the home city, sometimes to relieve the pressure of the landless at home but always to be subordinate to and rigidly governed by the mother city—the Roman Colony sent tribute to Imperial Rome to supply *panem et circenses* to the proletariat. A British Colony pays no tribute to, is in no way governed by, Britain; it is a self governing nation.

More than half a century ago four Colonies on this Continent agreed to join forces—their statesmen met and carefully elaborated a scheme of union without outside assistance,—that plan was placed before the Imperial Parliament, responsible British Ministers of the Crown informed Parliament that that was the bargain—and that plan became law⁹. When we want it changed in any way, our Houses of Parliament at Ottawa draw up the change desired and it is changed accordingly. (There was a time when I thought that our Constitution could be changed more easily and expeditiously than that of the United States; but a nation that can change its constitution so as to prohibit the drinking of intoxicating liquor so easily and expeditiously as the United States, has a constitution flexible enough for any purpose—I am rebuked and silent—I doubt if there has been a more marvelous moral phenomenon since in "Caper-

⁸Many times and oft used in such a way that it becomes an abuse, a peril to the civilization of which it should be the mainstay. But what good thing is not? Corruptio optimi, pessima.

⁹One change was suggested by a member of the British Government: the Colonies had agreed on the name Kingdom of Canada—Lord Stanley feared that this name would offend American susceptibilities—the United States was not very friendly at that time, it had denounced the Reciprocity Treaty and was making a good deal of trouble over the Alabama and Shenandoah—and so the name was changed to Dominion of Canada, our Statesmen having even then the vision soon to be a reality of a "dominion * * * from sea to sea."

naum a city of Galilee they were all amazed and spoke among themselves saying what word is this? for with authority and power He commandeth the unclean spirits and they came out.")

What is Canada? I do not speak of her broad plains or her flowing rivers, her flocks and herds on a thousand hills or her mines of gold and silver, nickel and iron—but of her manner of government. To one considering the form of government of the United States the written constitution will give a fairly accurate view of the facts—true there is here and there a little camouflage and the personal equation must always be taken into account but speaking generally what the document says is so, is so. To one considering the form of government of Canada without previous information, the written Constitution is wholly misleading—historical camouflage again.

We have a Dominion with a Governor-General called a Governor on the lucus a non lucendo principle because he does not govern¹⁰.

Ministers are appointed by the Governor-General i. e., the majority party in the House of Commons by a formal or an informal method selects its leader and the Governor General calls him to be Prime Minister¹¹. There is no fixed method of selecting a leader—he may be chosen at a caucus of members of parliament or at a convention of the party or by common consent—there may be difficulty sometimes to know how anyone becomes a leader, there is seldom any difficulty in knowing who is the leader.

The Prime Minister selects his colleagues and presents their names to the Governor and the Governor accepts them and appoints them under the Great Seal of Canada "during pleasure." That ostensibly means the pleasure of the Governor General: it really means the pleasure of the people's representatives in the House of Commons¹².

10. I once told a Governor General to his great amusement that he was called Governor General on the same principle as a stream which ran through the father's farm was called "Trout Creek" because it was a creek with no trout in it. It is a Governor had no trout in it.

11. I think the other delightful bit of reminiscence in England about the Government of this day headed off by a Banister or an infidel as he is called a Bishop or a Vicar General, a "Clergy" or a "Clergyman" is the King's license of marriage in the Dean and Chapter to elect a Bishop—but the heavy old lines of delectable memory Henry VIII in 1533 had his Parliament enact that the Sovereign might grant this license "with a letter private containing the name of the person whom they shall elect and choose"—and the Dean and Chapter have to elect and choose the person so named. No parliament only they name.

12. The Statute of the Province of Ontario, the Lieutenant Governor who in the Province occupies the same position (in sub-

If a Ministry loses control of the House of Commons it must resign unless by a new appeal to the people it succeeds in obtaining a majority. The same rule obtains in the Provinces which together form the Dominion. Let me give you the most recent example of change of government in Dominion and Province.

Sir Wilfrid Laurier's Administration went to the people in 1911 on the question of Reciprocity with the United States; the majority of those elected to the Commons were against Reciprocity; as soon as it was seen that Sir Wilfrid would not have a majority in the new House of Commons, he and his Ministry resigned. Robert Laird Borden had been elected Leader of the Conservative party at a caucus in 1901 (Sir Charles Tupper had retired from Canadian public life after his defeat in 1896) and was still Leader in 1911—the Governor Gen-

eral (as the Governor General in the Dominion may appoint persons to form the Executive Council all of whom are thereby Ministers and from the Ministers appoint certain Ministers to preside over departments. One Lieutenant Governor who took himself seriously thought the Statute means what it said consulted a lawyer friend about declining to appoint one obnoxious person who had been chosen by the Premier and was advised to do as he was told.

Since the above note was written an episode has occurred which will illustrate our Canadian (and British) ways as well as matters of vastly more importance and accordingly I shall give it with some circumstantiality.

We have a Government House in Toronto for the Province of Ontario, i. e., an official residence for the Lieutenant Governor: it cost a considerable sum to build and costs a considerable sum to keep up. During the last election a number of the U. F. O. candidates spoke strongly against the so-called extravagance of the Government in keeping up an expensive establishment—and it was more or less widely understood that the U. F. O. was in favour of closing it up. (I do not know whether that was or is the policy of the U. F. O.—I simply state the facts historically). A new Lieutenant Governor was appointed by the Governor General (i. e., the Ottawa Government) for the Province after the new Governor in Toronto had been sworn in. At a dinner of the "Rotarians" (which I understand is a euphemistic way of saying "Bourgeois") Mr. Clarke the new Lieutenant Governor made an after dinner speech. This as his first speech since appointment naturally attracted much attention from the press and the public generally. Amongst other things which he was reported to have said was something about Government House—I will quote some.

"Referring to the unrest of the times, he declared: 'I do not think any of you can appreciate the work which is carried on at this place and during the past week' turmoil in Windsor. And there is nothing which would please the Statute or the Believing more than to abolish Government House and the office of Lieutenant Governor and all those things which our Canadians hold dear.'"

No principle is more firmly established in our Responsible System than that His Majesty or His Majesty's Representative must not discuss party questions, he must have no opinion (to be publicly expressed) on any party question; he can say only what his duty is as the Minister of the day, approve or he must find

eral sent for him, he formed an Administration and became Prime Minister: later on a Coalition was formed to carry on the War and this weathered the General Election (unless the time is extended by Act of the Imperial Parliament which cannot be without a practically unanimous request of the Canadian Houses of Parliament¹³—a Dominion Parliament does not sit more than five years without an election.)

The latest Provincial Election was that of the Province of Ontario in November, 1919.

Mr. (afterwards Sir) George W. Ross headed an Administration but suffered

a Ministry that will approve and take the responsibility of what he says. Accordingly if Mr. Clarke did make the statement attributed to him, it was either an inadvertence and indiscretion pardonable perhaps on account of inexperience in public life—or it was a statement of which the Ministry approved and therefore they were committed to the policy of keeping up Government House—or it was a challenge to the Ministry and their party. In no case could it be overlooked unless the Ministry were willing to assume responsibility for the statement. Consequently the Prime Minister took the matter up: it turned out that the Lieutenant Governor had been wrongly reported or at least he had not intended to say what he is reported to have said—and the rising tempest was allayed—the verdict being 'Not Guilty but don't do it again.' The following is the official correspondence:

THE OFFICIAL CORRESPONDENCE.

'Following is the official text of the communication addressed by the Premier, E. C. Drury to his Honor the Lieutenant-Governor, and the latter's reply addressed to the Premier:

'Toronto, January 14th, 1920.

'Dear Mr. Clarke,—

In view of newspaper reports of your recent speech before the Rotary Club in regard to Government House, I think it desirable to ascertain from you if these reports are correct; and I do this because they admit of several interpretations, all of which tend to destroy that appearance of unity, which in the interest of stable government, should be maintained between the representative of his Majesty and his constitutional advisers.

I trust you will appreciate the spirit in which I write, and that a way may be found to remove any misapprehensions that may have arisen in the public mind in this connection.

I am,

Yours very respectfully,

(Signed) E. C. Drury.

His Honour Lionel H. Clarke,
Government House,
Toronto, Ontario.

'Government House, Toronto,

15th January, 1920.

Dear Mr. Drury,—

I have the honor to acknowledge receipt of your letter of the 14th instant, and fully appreciate the spirit in which you write. The reports of my speech before the Rotary Club which appeared in the daily press were not wholly accurate, and comments thereon have, I fear, created an erroneous impression, and attributed to me motives altogether absent from my mind when speaking. It was most certainly not in my intention to give expression to

defeat in 1905. Mr. (afterwards Sir) James P. Whitney was at the time Leader of the Opposition having been elected at a caucus some years before, he was sent for by the Lieutenant Governor and formed an Administration which remained in power until his death in 1915, when he was succeeded as Premier by Mr. (afterwards Sir) William H. Hearst¹⁴. The Legislature lengthened its own life by a year not wishing to have the country torn by an election in the midst of War¹⁵. In November, 1919, the Government appealed to the people and did not succeed in having a majority elected to support it¹⁶. Had the usual state of politics existed the course of the Lieutenant Governor would have been plain: there would have been two political parties,

my personal views upon any matter in active public controversy. The constitutional practice in this report is fully understood by me, and I need not say it will at all times be my most earnest desire to uphold the precedents and follow the well-established usages governing the relationship between the representative of his Majesty and his constitutional advisers.

I should deeply regret if the incident in question should, in the slightest degree, interfere with the good feeling which has existed between the Government and myself since my appointment to office.

Believe me,

Yours faithfully,

(Signed) L. H. Clarke.

The Hon. E. C. Drury, Esq.,

Prime Minister of Ontario,
Parliament Buildings, Toronto."

As such correspondence must be considered confidential between His Majesty's Representative and his Ministry, his leave must be obtained to its publication: consequently it was necessary to state that the 'Lieut.-Governor approved of the publication of letters' hence this communication:

'Sir:—

The question having been raised in the press, I am directed by the Lieutenant-Governor to state that His Honour gave his consent and approval to the publication of the letters of the 14th and 15th instant, between the Prime Minister and himself, before they were given to the press.

Alexander Fraser,

Lieut.-Colonel,

Official Secretary."

¹³The Canadian Houses of Parliament unanimously asked for an extension of one year which carried them over 1916; but there was a large minority which opposed a request for another year's extension (the vote in the Commons was 82 to 62) and no request went forward for another year's extension—hence the election.

¹⁴How Mr. Hearst was selected to be the Leader of the Government has not been made public officially: it is enough that he was accepted by the Party as its head.

¹⁵A Province has the power of amending its own Constitution except as regards the office of Lieutenant-Governor—the Legislature can lengthen its own life &c. &c.: the Legislature of Ontario did so.

¹⁶Seven out of the nine Provinces of the Dominion have only one House—there are two with two Houses—Ontario began with one. Some others began with two and abolished one—some (not all) Canadian think a second House not only useless but an actual encumbrance.

the one in power, the other in opposition, each with its leader, the Government being defeated it would resign and the Lieutenant Governor would send for the Leader of the Opposition who would form his Ministry and take over the reins of power. But the actual state of affairs was anomalous: the two historical parties, Conservative and Reform, had practically all the members in the former Legislature; an organization called the United Farmers Organization—the "U. F. O."—had been formed which repudiated both the old parties and had a programme of its own. It had in the recently deceased Legislature two members; and it put candidates in the field in many constituencies in which there were rural voters. Rather to the astonishment of the old parties, the U. F. O., elected more members than either, but it did not elect a majority of the Members of the House. There was, however, still another party, smaller than any of the others, which had a member in the late House; at this election it was more successful. With this Labour party, the U. F. O. formed a kind of coalition and the two parties together had just a majority of the members. There was another difficulty—the U. F. O. had no recognized leader who could be sent for to form a Government. A meeting was held of the U. F. O., members and a leader, Mr. Drury, was chosen; the Lieutenant Governor sent for him and he has formed a Ministry.

The difficulties are not yet over—the Leader chosen by the U. F. O., has not a seat in the Legislature; he was not a candidate at the election at all. It is one of the cardinal rules of our traditional constitution that every Minister of the Crown must have a seat in Parliament—consequently Mr. Drury must find a constituency to elect him. That means that some member must resign and the Prime Minister be elected in his place¹⁷. Two of the other Ministers are in the same condition; accordingly Mr. Drury must find three seats somewhere. If a seat is not found for any Minister, that Minister, Prime Minister or other, must resign. You will ask "When must the seats be found?" I answer, "I do not know, nor does anyone else." In theory, the seats must be found within a reasonable time—in practice before the majority of the Legislature say they won't have it any longer—or the Lieu-

tenant Governor takes an immovable stand that the Minister resign. In this as in most else in our Constitution there is no law¹⁸; usage and tradition govern; and if the Legislature have a mind to disregard usage and tradition, none may say them nay. Even if the Lieutenant Governor insist on a Minister resigning, the Prime Minister may take a stand against him and the Lieutenant Governor must retreat or find some Prime Minister to take the responsibility of his action who himself can obtain the support of a majority of the House as then constituted or as constituted by an election to decide his fate.

With almost negligible exceptions, in our political organization, the last say is with the voter—and that in practice generally speaking is tantamount to saying in the Legislature with the members voting with the eye on their constituents and the fear of the next election in their hearts.

One of your politicians—No, we must call him a statesman for he is dead—said "what is the Constitution between friends?" and there is some tradition not yet dead that he lived up to the principle implied in the question.

In our Province, in our Dominion, the Legislature except in the case of matters which are specifically prescribed—and there are extraordinarily few—may break the Constitution to pieces and throw the pieces over the fence; if this does not suit the electorate, the next House will gather up the pieces and patch up the injured Constitution¹⁹.

This may explain our apparent indifference to revolutionary movements: violence we put down but anything short of actual violence or incitement to it we pay no attention to—if the people be

¹⁸As I have already indicated, the difficulty the American often finds in thoroughly appreciating our Constitution is based upon the fact that the expression "Constitution" has a wholly different connotation in the two countries.

¹⁹In our usage the Constitution is the totality of the principles more or less vaguely and generally stated upon which we think the people should be governed. In American usage the Constitution is a written document containing so many words and letters which authoritatively and without appeal dictate what shall and what shall not be done. With us anything unconstitutional is wrong however legal it may be. With the American anything unconstitutional is illegal however right it may be—with the American anything unconstitutional is illegal. With us to say that a measure is unconstitutional is rather to suggest that it is perfectly legal but inadvisable, and contrary to traditional usage. Riddell, "The Constitution of Canada" Yale University Press, 1917.

²⁰Of course it must be seldom that there is a complete reversal of any course of action:

(A) the King's messes and all the King's men
cannot make the Constitution what it was again."

¹⁷Mr. Drury has now February 23, been elected.

persuaded they must have their way; but they must not be persuaded with a club, the "big stick" never was intended for any but external application²⁰.

We have some eight millions of people living under that kind of government—at our very doors is the ancient colony, Newfoundland with her quarter to half a million of freemen.

Across the broad Pacific sprinkled with British Islands, under the Southern Cross stretches the broad plains of Australia, a great and growing Commonwealth²¹ with her six separate but United States, New South Wales, Victoria, South Australia, Queensland, Western Australia, Tasmania—each State and the Commonwealth having its own Parliament in like but not identical manner as in Canada. Five or six millions are the happy possessors of that mighty Continent.

Cross the Indian Ocean to Africa and we find another British Dominion, the Union of South Africa²² with its four Provinces, Cape of Good Hope, Natal, Transvaal and Orange Free State, and its two to three millions of whites and large native population. Nor can we omit the paradise of the Southern Hemisphere, New Zealand, with its half million.

All these have Responsible Government, all are in everything but form independent, all have the British tradition, all are free nations²³ masters of their own destinies.

Then you may ask: "What is the advantage of British connection? I shall answer by asking "What is the use of the Starry Banner? Why the devotion

of a hundred million Americans to a bit of bunting dyed in different colours arranged in odd shapes?"²⁴.

There is the old Lion—there are the Lion's cubs—for a world to see.

With that form of government, those traditions and conceptions of freedom, could it be doubtful what the Old Land, what the New Lands would do when the arrogant challenge to democracy was thrown out by the Hun? Others might hesitate, might fail to see in the tiger bound on helpless Belgium the first step to world dominion. Britain was not blind nor her five sister nations. The "contemptible little army" crossed the channel and from across the great seas came the message from Canada "the last man, the last dollar."

There had been no lack of generous recognition by Americans of the part played by Canada—we appreciate the sympathy for are we not very brethren?

But the insidious foe of both the United States and Britain, the denizen of the United States whose patriotism consists not so much of love for his native or his adopted land as of hatred for England, shouts where he may, whispers where he dare not shout—what has England done?

Tell me, ye liberty-loving Americans who throughout the war was most hated by the Hun? Was there any curse more heart-felt than "Gott strafe England"? Until the American appeared was there anyone against whom bitter vengeance was threatened as against England? Belgium might be set free on conditions, France might be robbed of territory and left to live out a maimed and shattered existence, but England must be destroyed—the British Empire dismembered and enslaved.

These furnish an answer to the taunt—what has England done?—as well as furnish the reason why the taunt is uttered. A deliberate calculated propaganda has been and to this day is carried on to belittle the part taken by the Mother of Constitutional and Responsible Government in the eyes of her children in other Continents—and that propaganda is virulent in the United States. If Ohio has escaped its malevolent and vicious effects, Ohio is fortunate.

Let me answer in the words of one of your own people:

"WHAT HAS ENGLAND DONE?"

Strange, that in this great hour, when
Righteousness
Has won her war upon Hypocrisy,
That some there be who, lost in little-
ness,

²⁰I may be pardoned for relating here an anecdote in which the name of the author of the "big stick" figures. In California once an enthusiastic American friend taking pity on my benighted Canadianism said "Why don't you have a President? Why don't you get a chief like Teddy?" Of course I had no answer available. A few days intervened before I saw my friend again and in the meantime the Colonel "started something"—"factories of great wealth" (my friend had some money) or the like. Next time my friend and I met he looked glum; and on my asking—with that light and irresponsible joyousness which should characterize His Majesty's Justice on a holiday and three thousand miles from home—"Well, how is the model President suiting, this morning?" he answered in language which I do not transcribe but which indicated a fervent wish that the President's future should not be blessed—I cheerfully said "Then you will get rid of him!"—a hopelessness mingled with malignity spread over his countenance—"How on earth (that was not the word but I bawdlerize) can we?" he has us foul for three years yet, bless him!"

²¹Created by the Imperial Act (1900) 63, 64 Vic. c. 12.

²²Created by the Imperial Act of (1909) 9 Edw. VII. c. 9.

²³To which some—even some Americans—would refuse a voice in the concert of nations!

²⁴I say nothing here of the semi-independent but not really self governing British possessions.—India, Egypt, Malta, and the like.

And mindful of an ancient grudge, can ask:

"Now, what has England done to win this war?"

We think we see her smile that English smile,

And shrug a lazy shoulder and—just smile.

It was so little worth her while to pause In her stupendous task to make reply.

What has she done! When with her great, gray ships,

Lithe, lean destroyers, grim, invincible, She swept the prowling Prussian from the seas;

And, heedless of the slinking submarine, The hidden mine, the Hun-made treacher-ies,

Her transports plied the waters cease-lessly!

You ask what she has done? Have you forgot

That 'neath the burning suns of Pales-tine

She fought and bled, nor wearied of the fight

Till from that land where walked the Nazarene

She drove the foul and pestilential Turk? Ah, what has England done! No need to ask!

Upon the fields of Flanders and of France A million crosses mark a million graves; Upon each cross a well-loved English name.

And, ah, her women! On that peaceful Isle,

When in the hawthorn hedges thrushes sang,

And meadow-larks made gay the scented air,

Now blackened chimneys rear their grimy heads,

Smoke-belching, and the frightened birds have fled

Before the thunder of the whirling wheels.

Behind unlovely walls, amid the din, Seven times a million noble women toil With tender, unaccustomed fingers toll, Nor dream that they have played a hero's part.

Great-hearted England, we have fought the fight

Together, and our mingled blood has flowed,

Full well we know that underneath that mask

Of cool indifference there beats a heart, Grim as your own gaunt ships when duty calls.

Yet warm and gentle as your Summer skies;

A Nation's heart that beats throughout a land

Where kings may be beloved, and Monarchy

Can teach Republics how they may be free.

Ah! What has England done? When came the call,

She counted not the cost, but gave her all!

For one who knows that for every heroic son over whose grave the United States or Canada weeps but proudly refuses to mourn, the British Isles knows their loss was to Canada's more than two to one, to that of the United States as thirty to one, it needs not to be a generous hearted American but only to be a man with a decent sense of fair play to scorn the imputation contained in the words, "What had England done?" and to despise him who utters them with a sneer²⁵.

The old Lion baring breast for the fight, what could Canada do? No cry was there for help—the outward ear heard naught; but heart beat to heart:

"HEAR, O Mother of Nations, in the Battle of Right and Wrong,

The voice of your youngest Nation, chanting her battle song.

Blood of your best you gave us—gave it that we might live;

Blood of our best we offer, the best of our youth we give.

The price of a Nation's manhood, we offer to pay the debt—

Did you dream, O Mother of Nations, that Canada could forget?

The price of a Nation's manhood—we have counted the bitter cost—

(For whom can we call the victor, if the battle be won or lost?)

We pay and we pay it gladly—ours is the Empire's need—

And a broken word has never yet found place in Britain's creed.

And when on the side of Justice, Victory takes her stand,

And a pallid Peace is brooding over a broken land,

We shall count the cost but little, glad of the chance to pay

²⁵The appalling toll taken of Britain's young manhood by this war found every circle, every class, every town, village, hamlet and countryside. Within the month I have been told by an English Duchess that of the thirty-two young men who lived on such familiar terms with her household that they ran over at any time without invitation or formality to have a game of tennis with her girls—so she put it—only six survive. She said nothing of her own family's sacrifice; when I mentioned it, there was no tear or lament only that look of mingled pride and anguish we have learned to know so well.

Is there any familiar circle of young friends of the household of an American or Canadian Magnate of which the same can be said? Kipling would not now talk of "dimpled fools" and "muddled oafs at the goal."

For a stronger chain of Empire and
the dawn of a better day.

Go forth, O Mother of Nations, to the
battle of Right and Wrong.

In the strength of your young Dominions,
to the sound of their battle-song!"

And did the Canadian Mother give up
her boy for the sake of glory? of trade?
of money? Nay, hear her:

"These hands whose weakness knew
your baby weight,
So heavy yet so dear, and held it fast,
Now loose the bond which love and serv-
ice gave
And let you go at last.

See, I unclasp each clinging fingerhold,
Open and wide my empty arms I throw—
What tho' lips tremble and the heart
grow chill,
Both lips and heart say 'Go!'

Not for the lust of battle or its pride,
Nor for the dream of glory do I give,
But that a dark and wicked thing may
die,
And Liberty may live!

These lips which found world-sweetness
in your kiss,

Kiss you once more before an open door;
I love you just enough to say good-bye—
I could not love you more!"

Lloyd George the great War Prime
Minister gave the British Empire its
watchword which with God's help we
will observe and keep forever:

HOLD FAST.

Lloyd George's Watchword to the Brit-
ish Empire.

Hold Fast

To that unsullied honor that maintains
Inviolate thy sacred word once given.
Never to thee a scrap of paper. No!
But binding as the stern decrees of
Heaven.

Hold Fast.

To that old courage that knows not de-
feat,
Though many times outnumbered and
outfought.
The thin red line may bend, it cannot
break!
Thy foes' best deep-laid plans must
come to naught.

Hold Fast.

To that untiring vigilance that robs
The fiendish sea-wolves of their helpless
prey:
That meets and foils the vultures of the
sky
And keeps their murderous designs at
bay.

Hold Fast.

To that mystic bond of union that makes
The mighty Empire, one o'er all the
earth,

The wonderment of an admiring world,
Whose power can ne'er be measured or
its worth.

Hold Fast.

To faith in God, and in His holy plans
Which work unceasingly, though hid
from sight.

Banish all doubts and fears, victory
must come
Naught can withstand the onward march
of right.

Hold Fast.

To sister nations, who have pledged
their all

To make this old world a fit dwelling
place,

Whose high ideals have welded them
as one,

Who aim for liberty of all the race.

And when thy foes who never have dis-
dained

To use such methods that would cause
to blush

The denizens of lowest hell, at last
Discover how low they fell, and rush
With bleeding footsteps, purified by fire
To that high plain where manhood dwells
and where

The eternal verities of honor, love and
justice reign supreme

And with opened eyes discover their
true worth

And with hearts sincere, eternally Hold
Fast.

Such we are, such we will continue so
long as God gives us strength.

Americans, successors to the Revolu-
tionary heroes who dared all for the
cause they deemed to be right, heirs of
Washington and of Lincoln, are we the
kind of men you wish as friends, as
comrades and as very brothers? We
hold out to you hands of invitation—I
had almost said entreaty but that word
we British shall never use—will you
grapple us to your soul with hoops of
steel? Friends we have been, each has
tried the adoption of the other. Sixty
thousand Canadians fought in the Amer-
ican Army to free the Slave, ten thou-
sand Americans in the Canadian Army
to free the world. Are we now and for-
ever to stand side by side and if need
be fight side by side for the right? The
whole world awaits the answer, spelling as
it must woe, incalculable and illimi-
table or the reign of peace and righteous-
ness. On that answer hangs the tremen-
dous issue whether the nations
"shall beat their swords into plowshares
and their spears into pruning hooks,"

whether "nation shall not lift up sword against nation neither shall they learn war any more"—

O ye great peoples of the English tongue.

Come ye and let us walk in the way of the Wonderful, the Counsellor, the Prince of Peace for of the increase of His government and peace there shall be no end.

We fear not, like will to like, the eternal decrees of right cannot be repealed—there may be delay, even apparent retrograde movement but in the end there can be but one result—lovers of the English speaking peoples may rest in quiet for the outcome is not doubtful—We can say with John Burroughs, your own good and great old man,

"Serene, I fold my hands and wait—

Nor care for wind, nor tide, nor sea;
I rave no more 'gainst time or fate,
For lo! my own shall come to me.

I stay in haste, I make delays
For what awaits this eager pace?
I stand amid the eternal ways
And what is mine shall know my face.

Asleep, awake, by night or day
The friends I seek are seeking me,
No wind can drive my bark astray
Nor change the tide of destiny.

What matter if I stand alone?
I wait with joy the coming years.
My heart shall reap where it hath sown
And garner up its fruit of tears.

The waters know their own and draw
The brook that springs in yonder heights:
So flows the good with equal law,
Unto the soul of pure delights.

The stars come nightly to the sky,
The tidal wave comes to the sea;
Nor time, nor space, nor deep nor high
Can keep my own away from me."

SUPREME COURT OF OHIO.

Tuesday, February, 24, 1920.

General Docket—Cases Reported with Opinion.

Official Syllabi.

16441. State, ex rel. Inter-Insurance Agency Co., v. William H. Tomlinson, Superintendent of Insurance of State of Ohio. In Mandamus.

MERRELL, J.

Under sub-section 4 of Section 9607-2, General Code (107 O. L. 647), which provides that "A mutual or a stock insurance company may transact * * *

tomobile Insurance. Against loss, expense and liability resulting from the ownership, maintenance or use, of any automobile or other vehicle, provided no policies shall be issued under this sub-section against the hazard of fire alone," such insurance company, domestic or foreign, otherwise entitled by law, and assuming to transact business in the state of Ohio under the provisions and within the scope of said sub-section only, is authorized to enter into contracts of insurance or re-insurance in this state with respect to automobile property, against the hazards of theft, property damage, collision and liability to the public, and in connection therewith, against the hazard of fire.

Writ to issue.

Nichols, C. J., Jones, Johnson and Robinson, JJ., concur. Matthias, J., not participating.

16388. Higbee Company v. Walter Jackson, an Infant, etc. Error to the court of appeals of Cuyahoga county.

JOHNSON, J.

1. Where an employe, to whom the owner has committed the operation of an auto-truck in the owner's business, permits an infant to ride on the truck in violation of his instructions and the infant is injured by the wanton and wilful conduct of the employe, while in the course and in the scope of his employment, the owner is responsible.

2. Where one is a trespasser on an auto-truck, which has been committed to an employe by the owner for operation in the owner's business, and the trespasser is injured by the wanton and wilful conduct of the employe while in the course and within the scope of his employment and while aware of a perilous position of the trespasser, the owner is responsible.

3. To constitute wanton negligence it is not necessary that there should be ill will toward the person injured, but entire absence of care for the safety of others, which exhibits indifference to consequences, establishes legal wantonness. Such a mental attitude distinguishes wrongs caused by wanton negligence from torts arising from mere negligence.

4. The simple violation of a statute or ordinance does not of itself constitute wilful and wanton negligence. The question whether there was such negligence and if so whether it was the proximate cause of injury in a particular case, is one of fact to be determined by the jury in the light of all of the facts and cir-

cumstances shown by the evidence under proper instructions.

Judgment affirmed.

Nichols, C. J., Matthias, Wanamaker, Robinson and Merrell, JJ., concur. **Jones, J.,** dissents.

16214. **Mary L. Martin and Frederick L. Martin v. City of Columbus.** Error to the court of appeals of Franklin county.

WANAMAKER, J.

1. An action brought by a municipality to condemn private property under the constitution and laws of Ohio, is a proceeding in rem.

2. In such proceeding, there are no formal pleadings or definite issues, which admit of affirmation upon one side and denial upon the other, and hence the doctrine of "burden of proof" has no application.

3. The jury acts merely as an appraising or assessing board, determining the fair market value of the property from all the evidence submitted.

Judgment reversed.

Nichols, C. J., Johnson and Robinson, JJ., concur.

16207. **Andrew Godfrey et al. v. Amelia Epple et al.** Error to the court of appeals of Meigs county.

NICHOLS, C. J.

The phrase "nearest of kin" when employed in a last will and testament in the absence of language in the will manifesting a different intention, is to be so construed as to embrace within its meaning such as would inherit under the statutes of descent and distribution, and in the order and proportion therein provided.

Judgment affirmed.

Jones, Matthias, Johnson, Donahue, Wanamaker and Robinson, JJ., concur.

16254. **Western & Southern Life Insurance Co. v. Alice R. Horn.** Error to the court of appeals of Hancock county.

NICHOLS, C. J.

A provision in a policy of life insurance issued by an Ohio company to a citizen of Ohio, that, in the event of suicide of the insured within two years from the date on which the insurance begins, the limit of recovery shall be the amount of the premiums paid, is not prohibited by Section 9421, General Code, nor by any other section of the General Code of Ohio.

Judgment reversed.

Jones, Matthias, Johnson, Wanamaker, Robinson and Merrell, JJ., concur.

16317. **Oscar W. Kuhn v. Southern**

Ohio Loan & Trust Company. Error to the court of appeals of Hamilton county.

MERRELL, J.

1. A mortgage duly recorded, given for definite future advances which the mortgagee is obligated to make, is entitled to priority for the full amount of such advances over a subsequent mortgage recorded after the former one though prior to the making of such future advances. (*Spader et al. v. Lawler*, 17 Ohio 371, distinguished.)

2. Where a mortgage for obligatory advances is duly recorded, such record is notice to subsequent encumbrances of a prior lien for the full amount of such obligatory advances.

Judgment affirmed.

Nichols, C. J., Jones, Matthias, Johnson and Wanamaker, JJ., concur.

16308. **Columbia Graphophone Company v. Sare E. Slawson.** Error to the court of appeals of Cuyahoga county.

ROBINSON, J.

1. Section 11256, General Code, applies with equal force at all stages of a litigation.

2. Joint obligors upon a guaranty are parties united in interest within the meaning of Section 11256, General Code. The rendition of a judgment in favor of one, and not in favor of all, does not relieve a party seeking a reversal of such judgment from the jurisdictional obligation of making them all parties in an error proceeding.

3. The fact that an adverse party voluntarily dismissed his action against two of the joint obligors, without prejudice, after the rendition of the judgment sought to be reversed, does not sever their unity of interest, nor make them any less necessary parties.

Judgment affirmed.

Nichols, C. J., Jones and Matthias, JJ., concur. **Merrell, J.,** not participating.

16255. **James M. McClelland, Guardian et al. v. State of Ohio,** on Application of **George W. Clark and Bertha Clark.** Error of the court of appeals of Tuscarawas county.

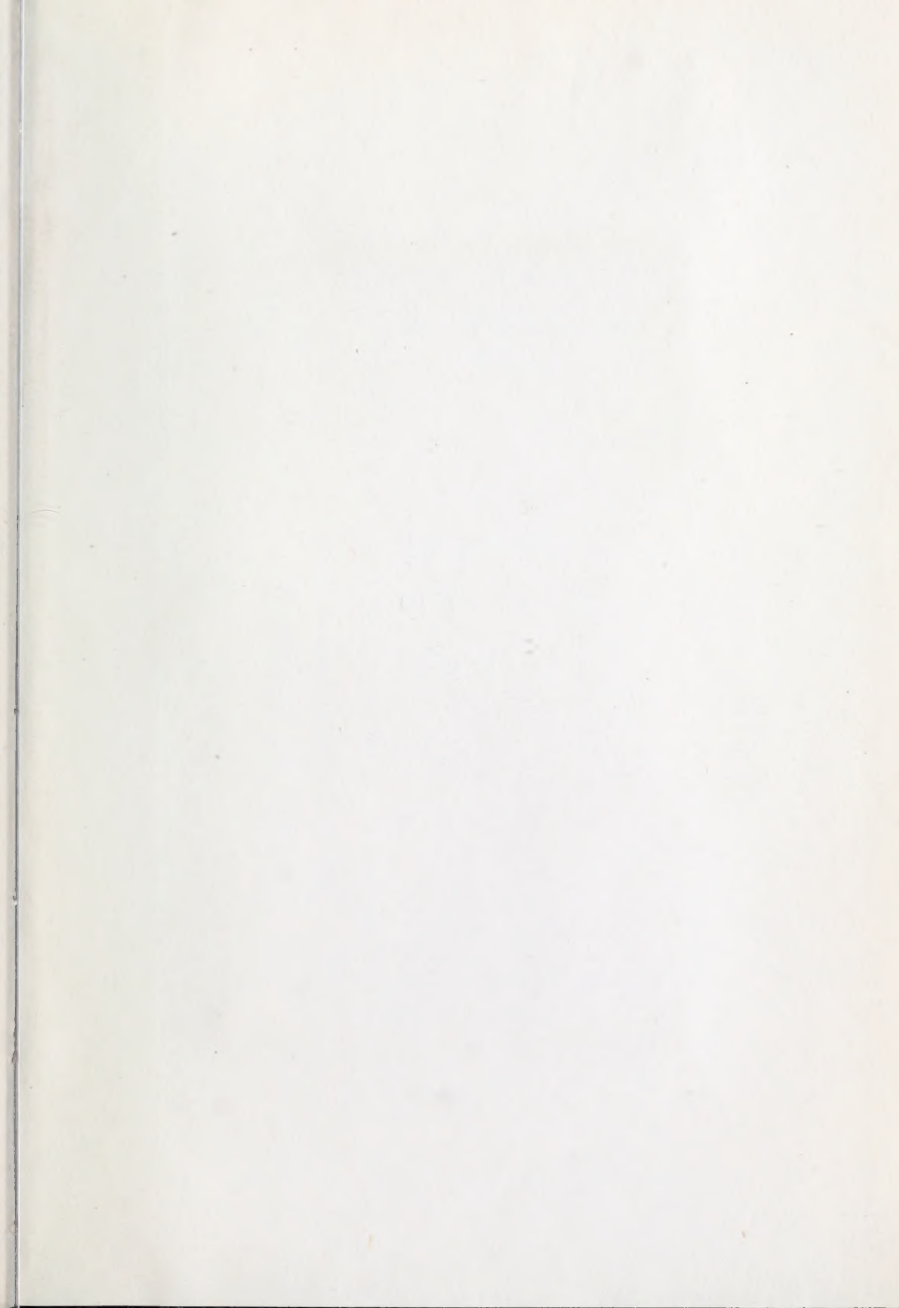
ROBINSON, J.

No limitation of time exists which will bar the issuing of a citation requiring a guardian to file an account of his trust. (*Phillips v. State, ex rel. Harter*, 5 Ohio St. 122, disapproved and overruled.)

Judgment affirmed.

Matthias, Johnson and Wanamaker, JJ., concur.

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